# IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 78209



SIAOSI VANISI

Appellant,

v.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON, AARON FORD, ATTORNEY GENERAL OF NEVADA,

Respondent.

Appeal from Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)
Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer

## APPELLANT'S OPENING BRIEF

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The Washoe County Public Defender appeared on behalf of Vanisi during pre-trial and trial proceedings. The Washoe County Public Defender also appeared on behalf of Vanisi before this Court during proceedings for an original writ and for Vanisi's direct appeal.

2. Marc Picker, Scott W. Edwards, and Thomas L. Qualls appeared on behalf of Vanisi during initial post-conviction proceedings before the district court.

3. Scott W. Edwards and Thomas L. Qualls appeared on behalf of Vanisi before this Court during proceedings for an original writ and for Vanisi's appeal from the district court's denial of post-conviction relief.

4. The Federal Public Defender, District of Nevada, has appeared on behalf of Vanisi in all subsequent proceedings.

/s/ *Randolph M. Fiedler*
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# I. CASE BACKGROUND

## A. Jurisdictional Statement

This Court has jurisdiction under NRS 34.575(1); 34.830; 177.015(1)(b); 177.015(3). The district court entered a Notice of Entry and Order Feb. 6, 2019 denying habeas relief. 38AA08167. The district court entered a second Notice of Entry of Order on February 22, 2019 denying a motion for leave to file supplement. 38AA08174–80. Vanisi filed a Notice of Appeal with respect to both notices on February 25, 2019. 38AA08181. This appeal is from the district court's final judgment in Vanisi's post-conviction proceedings. *See* 38AA08167; 38AA08176.

## B. Routing Statement

The Nevada Supreme Court retains this matter because this is a death penalty case. NRAP 17(a)(1).

## C. Statement of the Issues

This appeal presents four issues:

A. Whether the execution of someone who suffers from severe mental illness violates the Nevada Constitution's prohibition of "cruel or unusual" punishments.

B. Whether the district court erred by accepting Vanisi's waiver of his evidentiary hearing—ordered by this Court so the district court could hear evidence of Vanisi's mental illness as mitigation evidence—where it is the attorney's decision in how to litigate a claim, where Vanisi was not competent, and where this Court's order required an evidentiary hearing.

C. Whether the district court erred by failing to disqualify the Washoe County District Attorney's office, where trial counsel appeared to believe that they were represented by the district attorney's office, and where the district attorney's office did not disabuse trial counsel of that notion, and where the district attorney's office participated in obtaining a full waiver of confidentiality and privilege in their favor as a condition to post-conviction counsel obtaining the case files of prior counsel.

D. Whether Vanisi is entitled to habeas relief on his claim of ineffective assistance of counsel during the guilt phase, of a double jeopardy violation, and of his rights under *Faretta v. California*, 422 U.S. 806 (1975).

### D. Statement of the Case

Vanisi was convicted and sentenced to death in the Second Judicial District Court in late 1999. 18AA03816–21; 18AA03822.This Court affirmed the conviction and death sentence in 2002. *See Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001).

Vanisi filed a timely initial post-conviction petition. 19AA03933. On February 22, 2005, Vanisi filed, through counsel, a supplement. 19AA03953. The district court denied relief. *See* 21AA04381. This Court affirmed. *Vanisi v. State*, No. 50607, 2010 WL 3270985 (Nev. Apr. 20, 2010).[1]

On May 4, 2011, Vanisi filed a habeas petition before the Second Judicial District Court. 15AA03033. The district court denied relief. 34AA07109. This Court reversed and remanded for an evidentiary hearing. *Vanisi v. Baker*, No. 65774, 2017 WL 4350947 at *2–3 (Nev. Sept. 28, 2017). After the district court found Vanisi competent, Vanisi waived his evidentiary hearing and the district court denied his remaining claims. 38A08167.

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[1] Remittitur issued on July 19, 2010. *See* 15AA03031.

This appeal follows.

### E. Nevada Constitutional Provisions

Article 1, Section 6 of the Nevada Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel or unusual punishments be inflicted,* nor shall witnesses be unreasonably detained." (emphasis added).

## II. INTRODUCTION

"[M]ental illness or mental disorder of the defendant should be a consideration in mitigation of penalty."[2] There are, however, six reasons that severe mental illness is not reliably considered in mitigation of penalty. First, individuals who suffer from severe mental illness have a compromised ability to cooperate with counsel. Second, their illness makes them a poor witness—both because of how they appear and because their illness affects their perception. Third, severe mental illness causes distortions that result in poor decision-making. Fourth, though severe mental illness should be mitigating, jurors are at great

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[2] Larry Hicks, District Attorney of Washoe County and President of the Nevada Association of District Attorneys, S.B. 220, *Joint Assembly & Senate Jud. Comm. Hr'g*, Meeting Minutes, at 2, (Mar. 10, 1977).

risk of considering it aggravating. Fifth, state and defense experts are likely to disagree about the severity of mental illness, creating a risk that jurors will not understand the evidence. Finally, cases where the defendant suffers severe mental illness are often cases where the brutality of the offense might cause the jury to select a sentence infected with passion and prejudice.

Vanisi's case demonstrates these problems.

The Supreme Court has recognized that these problems required a categorical exemption from the death penalty for intellectually disabled offenders and juvenile offenders. This Court, construing the Nevada Constitution, should apply the same factors to hold that individuals suffering from severe mental illness are exempt from the death penalty.

## III. STATEMENT OF FACTS

This capital case comes from the uncommonly gruesome murder of University of Nevada police officer, Sergeant George Sullivan on January 13, 1998. *See* 16AA03282. Sergeant Sullivan, according to the State's closing, "was brutally beaten to death" with a hatchet. 8AA01662, 8AA01669. On January 14, 1998, after a stand-off with

police officers in Salt Lake City, Siaosi Vanisi was arrested and charged for Sullivan's murder. 8AA01580–91.[3]

For the next twenty years of litigation, Vanisi's mental health presented an intractable problem for his lawyers, the experts appointed to evaluate him, the district court, and this Court.

### A. Vanisi's mental illness manifested in bizarre behavior, leading to a competency evaluation and contributing to a mistrial.

After six months of bizarre behavior observed by guards, trial counsel voiced concerns about Vanisi's mental health:

> [W]e, the State and myself have received various reports regarding some bizarre behavior on behalf of Mr. Vanisi. From talking gibberish to washing himself in his own urine to dancing naked. I mean, stuff I do on Saturday night but stuff that's not the norm.

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[3] The State charged Vanisi with murder in the first degree, robbery with use of a deadly weapon, two counts of robbery with use of a firearm, and grand larceny. 16AA03280. The State alleged four statutory aggravating circumstances: the murder was committed in the commission of a robbery; the murder was committed upon a peace officer in the performance of his official duties; the murder involved torture or mutilation; and the murder was committed upon a person because of race. *See* 32AA06731;*see also* 16AA03280.

23AA04888. This was pre-trial, but counsel did not request a competency examination: "Well, I don't know. I guess a guy can dance naked and wash himself in his own urine and be competent as anybody else." *Id.*[4] Nonetheless, the court ordered ordered an evaluation. 23AA04919.

Counsel had gotten to this point because of red flags that arose as soon as Vanisi was arrested in January of 1998. At the Washoe County jail, officers and other inmates watched Vanisi "talking to himself" and "dancing in the middle of the day room floor as if he was doing a religious style dance." 26AA05534. Officers' concerns kept Vanisi in and out of suicide watch. *See, e.g.*, 26AA05530, 26AA05535, 26AA05537, 26AA05548. Vanisi would make "howling sounds." 26AA05556. He was extracted from his cell enough times that the Sheriff's Office moved Vanisi to Nevada State Prison, where other inmates reported, "That crazy mother fucker in A-4 is talking crazy . . . . Vanisi was telling me

[4] The court admonished trial counsel that Vanisi's mental health might be relevant to the penalty phase: "I don't know if it really affects his competency, but I think you should look into it, but it may affect your penalty phase if you get to a penalty phase. So you need to investigate that." 23AA04889.

how he did not like the way I was talking and out of know [sic] where started talking about eating pencils to kill himself . . . . he's always talking crazy and shit." 26AA05568.

By late July, the State contacted trial counsel to report concerns about Vanisi's competence because Vanisi was "acting very strange and bizarre" in prison. *See* 28AA05860. Trial counsel's notes reflected that Vanisi was:

1. wearing a hand-made mask
2. drawing tattoos on his arms
3. he is talking gibberish
4. he is pissing off every guard and inmate with whom he has had contact
5. some inmates have indicated they want to kill him
6. he is speaking in strange language
7. he is saying bizarre things
8. he talks ALL THE TIME and in a very loud voice about things no one understands
9. etc., etc., etc.

28AA05860. It was at the next court hearing that counsel reported the gibberish talking, the urine bathing, and the nude dancing. *See* 23AA04888. The court found Vanisi competent. 24AA05081.[5]

Though competent, trial counsel encountered difficulty working with Vanisi and concluded that the case was "indefensible." 28AA05885. Vanisi "began attempting to sabotage his defense team. He would refuse to sign documents (waivers, consent for documents, etc.), he would ask the same question over and over again (he wanted the answer to be as he wished), he would become difficult to deal with." 19AA03865. Because Vanisi's mental evaluations reflected "above average intelligence," Vanisi believed he was smarter than counsel. *See* 19AA03877.[6] For example, it took trial counsel "more than three (3)

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[5] In one of the competency reports, Dr. Philip Rich, M.D. diagnosed Vanisi with bipolar affective disorder. 18AA03720. In the other, Dr. Richard Lewis, Ph.D., indicated that "a bipolar disorder should be ruled out . . . ." 32AA06743.

[6] As discussed below, Vanisi's intelligence was actually one standard deviation below average. *See* § D.1.b below; *see also* 31AA06548 (full scale IQ score of 83).

months to convince [Vanisi] he should NOT go before a three-judge panel." 19AA03878.

A persistent disagreement before the first trial was whether to pursue a third-party defense. Against the advice of counsel, Vanisi insisted on presenting a defense that "Sonny Brown" committed the offense.[7] 28AA05916. Vanisi would not relent until counsel agreed to pursue an alternate suspect defense.19AA03866 ("After attempting to persuade the Defendant that the [someone else did it] defense was not workable in this case, we bowed to his wishes, after having advised him of the foolishness of his choice."); *see also* 19AA03878 ("The Defendant insisted in proffering the most implausible defense, against the advice of counsel").

The trial that resulted ended in mistrial. 25AA05332.[8]

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[7] As discussed below, an adequate investigation into Vanisi's background would have revealed that Sonny Brown was one of the many personalities that Vanisi inhabited in the throes of his delusions. *See* § D.1.a below; *see also* 26AA05483 (describing Sonny Brown personality).

[8] The mistrial resulted because of a flawed transcript, which the trial counsel relied on in preparing the defense. Specifically, a phone conversation transcript—provided by the State to the defense—indicated that an individual nick-named Teki stated, "I just did a 187,"

### B. Vanisi's mental illness manifested in bizarre behavior, leading to a competency evaluation and contributing to his conviction and death sentence.

#### 1. Vanisi's bizarre prison behavior continued.

Within four months of the mistrial, Vanisi's bizarre behavior was, again, the subject of a court hearing. Trial counsel explained that they had volunteered to assist the jail in managing Vanisi:

> Now, let me tell you what we have done. As soon as we were notified that Mr. Vanisi was involved in some unusual behavior, I immediately went up to the jail. He was in the infirmary. I calmed him down.
>
> . . . .
>
> I went to the trouble of giving my card—and I'm not going to say who—because you know the sheriffs department has, like all law enforcement agencies, they tend to punish people who don't do their jobs. But it was given to them with my phone number on it. *And I told them if he starts to show what they consider bizarre behavior or unusual behavior*, they are to call me any time of the day or night, and I will go and I will diffuse the situation for them.

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where "187" referred to killing. *See* 3AA00529; s*ee also* 2AA00352. However, in the audio, the statement was actually, "Baya just did a 187." 3AA00529–30. Baya was a nickname for Vanisi. In light of this transcription error, and the defense's heavy reliance on the transcript, the district court ordered a mistrial. 3AA00545–46.

24AA05064–65. Counsel's representations in May reflected the fact that there were continuing issues with Vanisi's mental health. Two months before, in March, the jail reported: "Midwatch said that Vanisi was sitting nude in his cell. Deputy Palmer noticed that Vanisi had arranged his uniform in such a manner that it appeared to be a person. When confronted about this configuration, Vanisi stated that 'It' is 'Casper.'" 27AA05598. This particular report noted that "[t]his morning, Vanisi did not have the toothpaste markings on his face . . . ." *Id.*

The following month, "Vanisi engaged in bazaar [sic] exercise. This included rolling around on the ground, standing on his head and running into the wall" 27AA05600. "After a brief conversation with an inmate in A-11 Mr. Vanisi stood on the top tier and pointed into the air. He started chanting." *Id.*

On May 3, 1999, a guard described Vanisi's behavior before a visit with trial counsel's investigator. When the guard informed Vanisi of the visit, Vanisi replied, "I don't fucking want to see him" and "Tell him to go away." 27AA05610. The guard's report further explained, "Vanisi had white cream all over his face, along with his thermal shirt wrapped

around his waist (Tonga Style)." *Id.* After the legal visit began, Vanisi "wip[ed] his face off, he stated, 'oh boy'! 'Now I look like a porn star!'" *Id.* On May 4 and May 5, Vanisi spent all day "banging on his door, toilet, and bunk," and "screaming," leading to a violent extraction. 27AA05611, 27AA05615–17. Another extraction occurred on May 6. 27AA05619.

Two days later, Vanisi was walking around the prison tier, "not wearing clothes." 27AA05620. Other inmates were giving Vanisi toilet water, which he combined with soap before pouring the soapy toilet water all over his naked body. *Id.*

The guards had had enough, and after talking Vanisi back into his cell, extracted him and transported him to Nevada State Prison. 27AA05620–21. In a video depicting Vanisi being transported, Vanisi's hair is unkempt, his beard grown out and unshaved. 28AA05867, Clip 12. For more than twenty minutes, Vanisi rambled without prompting or response from the transporting officers: he talked to himself non-stop in grammatically correct, but logically incoherent, statements that followed from nothing. *Id.*

In late May, the prison reported that Vanisi would come out with "toothpaste all over his face" and would "wear his underwear on his head." 27AA05634. A prison psychologist offered a diagnostic impression of severe manic bipolar disorder. 27AA05649. A psychiatrist later explained that Vanisi "described seeing strange shapes in his cell at the time that caused him to behave in a particular way" and "alluded to certain geometric figures that were forming out of the orange peel on his cell floor" even though "there was neither orange peel nor any geometric figures visible to anybody else in the area." 18AA03667–68.

### 2. Trial counsel sought medication for Vanisi's mental health.

Finally, in June, trial counsel asked the court for an evaluation to have medications prescribed for Vanisi:

> We talked to Mr. Vanisi this morning. He is highly emotional, and it's our opinion that a psychiatric evaluation should take place.
>
> . . . .
>
> But we don't feel—although I was able to talk to him, and I haven't had a substantive conversation with him since March, and I can't keep him on substantive issues, because we go off

> on to other issues that I don't care to put on the record at this point . . . .
>
> So we don't feel at this point, and I don't know quite how to put this, that he is emotionally capable of handling this hearing. So we're going to ask this Court to send him to Lake's Crossing for an evaluation and hopefully some sort of drug regimen that will allow us to continue.

24AA04995-96. Counsel added: "I just went to speak to him in the holding cell. He burst into tears. It's my opinion that he is not putting an act on." 24AA04997. The court agreed to order a competency evaluation, but counsel elaborated that his concern was more than competency:

> I have already indicated that this man needs some help, Your Honor. Just having two people talk to him and then deciding whether or not he's competent is not sufficient, in my opinion. This man needs some medical help so that I can deal with him as a defense attorney, and obviously, Mr. Bosler. And so that we can carry on proceedings in a fairly civilized manner.

24AA05000. The court minimized counsel's observation: "Of course, as you indicated, you are not professionals in this area. So we need to get the report from the doctors and their recommendation. I understand you have no objections certainly to their administering to him

something that will help." 24AA05000–01. Counsel added, "my experience is they don't do anything to help. They just make the evaluation and submit it to the Court under the Court's suggested treatment of this issue." 24AA05001. The court noted counsel's comment, but did not change its order. *Id.*

Vanisi was, again, found competent. 18AA03794.[9]

### 3. Vanisi's mental health continued to be a problem; the relationship between Vanisi and counsel began to breakdown.

Between the court ordering the competency evaluation and its finding of competence, Vanisi filed a pro per motion to fire his attorneys. 17AA03480. During the resulting *in camera* hearing, the court repeatedly asked Vanisi for specific issues between him and counsel; Vanisi, in turn, repeatedly queried the court about what it meant by "specific." *See, e.g.*, 17AA03514 (Court: "You have to be specific. What did they tell you, give you advice about that you did some

[9] For this competency evaluation, Dr. Thomas Bittker, M.D., and Dr. Frank Evarts, Ph.D., evaluated Vanisi. 22AA04616; 3AA00554. Dr. Bittker concluded that Vanisi was "malingering" but also indicated "rule out bipolar disorder." 22AA04622. Dr. Evarts concluded Vanisi was malingering. 3AA00555.

research on that you think they are wrong about?"); 17AA03516 (Vanisi: "Give me an answer of something specific because I'm afraid that I'm going to fail you again if I were to explain to you why. Give me an example, Judge."); *id.* (Vanisi: "Before I address that, can you give me another example? Can you give me another example of a specific issue? . . . because I'm not understanding exactly the specifics you are asking for. So give me—let's just hypothetical, give me a specific example, please."); 17AA03517 (Vanisi: "I think we need to try a little harder for the brain power because I tried to explain to you and yet it wasn't sufficient for you to understand."). Vanisi tried to explain at length his issues with counsel. 17AA03510–30. After giving trial counsel an opportunity to respond, the court denied Vanisi's motion. 17AA03530–43.

At the same hearing, trial counsel repeated concerns about Vanisi's mental health, noting, "Your Honor, I think you have seen an example of how manic Mr. Vanisi can be and how difficult he is to handle." 17AA03545. Counsel reiterated their request that the court order that the prison medicate Vanisi. 17AA03545–46. The court

disagreed with counsel's characterization of "manic": "I mean, he is excitable, but I would not call him manic." 17AA03546. Counsel emphasized the difference between Vanisi in court and Vanisi during visits:

> Mr. Gregory: Well, Judge, how would you like to be in a room with him as opposed to these formal proceedings where you have some control and you are not able to get his attention. That's the problem I have with Mr. Vanisi.
>
> The Court: Okay.
>
> Mr. Gregory: You can't have a substantive conversation because once he gets a thought in his mind, that's it, and you can't give him a reasonable answer, as the Court attempted to do, because he just continues and continues and continues.

17AA03546–47.

In July, trial counsel secured an ex parte order for medical treatment from the chief judge. 17AA03494. Shortly after, the State raised concerns about the order, so the trial judge ordered another

hearing regarding Vanisi's mental health. *See* 17AA03560. At the hearing, the court expressed its concerns about the complexity of the court supervision required for medicating Vanisi:

> This is my concern about the treatment. I have to be able to determine, number one, that the specific drugs that are being recommended will not affect his competency and his ability to assist counsel throughout the trial. And we also have to be clear that the actual drugs that are being administered are voluntary. I know that he wants drugs, but we still need to have specific inquiry.
>
> The other thing is, we need to have an ability to monitor this so we have periodic checks that actually the drugs are still appropriate. That's why I'm very uncomfortable ordering specific medications because I'm not a physician and I think it makes it difficult for the Court to monitor it.

17AA03571–72. Trial counsel emphasized the importance of medicating Vanisi: "The doctor has indicated that this will help Mr. Vanisi focus and cooperate with us, which he has had grave difficulty doing." 17AA03578. Counsel noted they would be able "to monitor him" and that they were "certainly not going to let him fall into some dark mental pit without informing the Court and/or the doctors." *Id.* Counsel made

clear, "I don't want the Court to involuntarily medicate Mr. Vanisi. *Mr. Vanisi understands that he's got a problem and that this might help him.*" *Id.* (emphasis added).

Subsequently, the jail started medicating Vanisi. At a hearing on August 10, 1999, Dr. Thienhaus explained that Vanisi needed anti-psychotic medication: "[t]he purpose . . . is usually impairment of reality testing. By that I mean delusional ideation; false, fixed ideas, in other words; and/or hallucinations of any kind." 18AA03664–65. Dr. Thienhaus explained that he prescribed the medication because "[a]t the time [Vanisi] was psychotic." 18AA03665. Vanisi was also given an anti-depressant and a mood stabilizer. 18AA03665–66.

#### 4. Vanisi requested to represent himself; counsel moved to withdraw.

The difficulties continued. Counsel noted that, "Subsequent to the mistrial, the Defendant realized the problems with his choice of defenses and reluctantly agreed to pursue the provocation defense at re-trial." 19AA03867. But after initially agreeing to pursue counsel's proffered defense, Vanisi changed his mind and "refused to cooperate

with counsel," leading to Vanisi's motion to represent himself. *Id.*; *see also* 17AA03490.

A *Faretta* canvas followed. The court asked numerous questions related to Vanisi's mental health and the medications he was taking. 17AA03616–23. As to his diagnosis, Vanisi explained:

> I first discovered it when I was incarcerated. I first, I first started paying attention to my psyche when I was incarcerated. But all throughout my life I've always been manic-depressive and I didn't know it. When I look back into my childhood, adolescence, I can see moments where I have been really manic and moments where I have been really depressed.

17AA03622.

The court denied Vanisi's request for self-representation, explaining that Vanisi "exhibited difficulty in processing information," "took an extremely lengthy period of time to respond to many of the Court's questions," "spoke out loud to himself in such a manner that it was at times difficult to determine if he was speaking for his own benefit or to the courtroom audience of the Court," had been "standing up and engaging in unsettling rocking motions," was "repeating himself

over and over again," and "has a history of aggressive and disruptive behavior while at the Nevada State Prison." 17AA03501–02.

The difficulties between Vanisi and counsel escalated: Counsel suggested a provocation defense to avoid first-degree murder; Vanisi responded by "refus[ing] to even communicate about that particular defense" for six months. 18AA03685. Instead, Vanisi insisted on the same defense theory from the first trial, that someone else committed the homicide. *Id.* Counsel countered that they could not ethically present that defense because Vanisi had already admitted his involvement. 18AA03685–86. So counsel contacted the bar; bar counsel instructed them to withdraw. 18AA03688.

Trial counsel explained the stakes to the court:

> Now we're in a situation, Your Honor, where although there's permissive language under 166 for this Court to order us to stay on, where we're going to have to certify ineffective assistance of counsel if the Court insists on doing that because we cannot violate our ethics, nor can we intentionally commit criminal acts. And we don't intend to do so.

18AA03688.[10] Counsel explained repeatedly that their continued representation would result in ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See* 18AA03691 ("by definition that's ineffective assistance of counsel. He has a right to effective assistance"); 18AA03692 ("Mr. Vanisi will not cooperate with that defense . . . . We're just sitting here like bumps on a log doing nothing."); *see also* 19AA03951. The court expressed its own frustration with the situation:

> The issue for the Court at this stage in the proceedings is I have a defendant who is malingering and a defendant who does not want to go to trial. I have a defendant who cannot represent himself. I have already ruled on that. I have a defendant who will continue to manipulate counsel.
>
> And if I rule at this stage in the proceedings that your representations are in fact correct, that you cannot represent Mr. Vanisi, and that you cannot fashion any defense in this case that is ethical, then I have set up to never have this case go to trial; and you may not believe that, but I know that to be the case.

[10] "166" refers to former Nevada Supreme Court Rule 166, which governed when a lawyer must withdraw from representation. *See* 19AA03947.

18AA03697–98. The court denied the request. *See* 24AA05054. Trial counsel petitioned this Court for a writ of certiorari or mandamus; this Court declined. *See* 3AA00620.

### 5. Counsel offered no guilt-phase defense and the jury found Vanisi guilty.

Trial counsel made no guilt-phase opening statements and waived their closing. 6AA01146; 8AA01634; 8AA01673. The State presented twenty-four witnesses; the defense cross examined five.[11] The cross-examination totaled eighteen pages of the roughly 500 page guilty-phase transcript.[12] It took the jury just two hours to find Vanisi guilty of murder of the first degree with the use of a deadly weapon, three counts of robbery with use of a deadly weapon, and grand larceny. 8AA01677; 8AA01680; *see also* 18AA03816.

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[11] *See* 6AA01169, 6AA01238, 6AA01254, 6AA01274, 7AA01294, 7AA01318, 7AA01336, 7AA01372, 7AA01411, 7AA01416, 7AA01422, 7AA01470, 7AA01477, 7AA01480, 7AA01491, 7AA01500, 8AA01567, 8AA01579, 8AA01630; *see also* 6AA01182–87, 6AA01223–29, 7AA01392–94, 7AA01395, 7AA01494–95, 8AA01592.

[12] *See* 6AA0133; *see also* 8AA01573; 6AA01182–87, 6AA01223–29, 7AA01392–94, 7AA01395, 7AA01494–95, 8AA01592.

### 6. During the penalty phase, the sole defense expert could not say that Vanisi was mentally ill.

During opening statements for the penalty phase counsel emphasized Vanisi's unremarkable upbringing. 9AA01777. Counsel then discussed a "change" that Vanisi underwent, and offered that this change was caused by a diagnosed mental illness. 9AA01778–79.

But of twenty-two witnesses, fifteen mainly testified about Vanisi's good character, offering observations that Vanisi "was always making sure that people around him was comfortable," 10AA01962; Vanisi was "the all-around great American kid," 10AA01995, who almost became an Eagle Scout, 10AA02053; Vanisi was not violent 10AA01976, 10AA02001, 10AA02009, 10AA02017; and was "a good all-around kid," 10AA02025, a good student 10AA02079, and a good person 10AA02087.

The evidence of Vanisi's "change" focused mostly on one instance: his strange behavior at his sister's wedding. *See* 10AA02018, 10AA02040, 10AA02059, 11AA02171. Witnesses also explained that Vanisi started wearing a wig, was unhygienic, dressed differently, and

was uncharacteristically disrespectful to a family member. *See* 10AA02017, 10AA02142, 11AA02320, 11AA02334–35.

Defense counsel called only one expert: Dr. Thienhaus, the jail psychiatrist, who conducted a "routine consultation for an inmate with a presenting complaint of mental illness referred . . . by the nurse at the jail." 10AA02095. This was not an expert defense counsel hired. Dr. Thienhaus was able to offer only "an *impression* of, quote, *possibly* bipolar disorder . . . ." *Id.* (emphasis added). The majority of Dr. Thienhaus's testimony offered a general explanation of the disorder. 10AA02096–103.

But when asked directly about Vanisi, Dr. Thienhaus demurred. Trial counsel directly asked Dr. Thienhaus if he concluded Vanisi suffered from bipolar disorder, Dr. Thienhaus responded, "Well, speaking just from my part, I cannot definitively say that . . . . but it's impossible for me with my limited database to come up with a conclusive diagnosis." 10AA02109. On cross-examination, the State raised the same point. 10AA02110 (Q: "And today as you sit here, you

say that it may be bipolar but you're not really certain of that?" A: "Correct.").

Trial counsel argued in closing that Vanisi suffered from mental illness, but during rebuttal the State reminded the jury that Dr. Thienhaus "never diagnosed him as being mentally ill. He diagnosed him as *possibly* manic depressive." *See* 12AA02483 (emphasis added); *see also* 12AA02443.

After four hours of deliberation, the jury imposed a death sentence. *See* 12AA02505, 12AA02511, 12AA02513.[13] This court affirmed the judgment. *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001); *see also* 12AA02527.

### C. Vanisi's bizarre behavior created difficulties during his first post-conviction proceedings.

Vanisi's difficulties continued into his post-conviction proceedings, and affected post-conviction counsel's ability to represent him.

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[13] The jury found the murder was committed in the course of a robbery, against a peace officer, and involved mutilation. 12AA02512. The jury declined to find that the murder was committed because of the race of the victim. *Id.*

### 1. The court had difficulty appointing counsel to this case because "no one wanted to take the appointment to represent Mr. Vanisi."

Originally, in March of 2002, the court appointed Marc Picker and Scott Edwards to represent Vanisi during post-conviction proceedings. 12AA02553. For a couple of months, post-conviction counsel had difficulty getting the file from trial counsel. *See* § V.C below.

However, Marc Picker moved to withdraw, exposing a difficulty in finding counsel to take Vanisi's case:

> The history of this matter is simple: No one wanted to take the appointment to represent Mr. Vanisi in this case because it promised to be a difficult, lengthy, time-consuming and thankless task. Only after a considerable number of requests did this counsel agree to take on the task. But, as with all things, circumstances change. Because this is a death penalty case which requires both the highest priority and the highest level of competence, this work should only be performed by someone who can dedicate the necessary resources and time to such a matter.

12AA02573. Counsel explained that both he and co-counsel were solo practitioners, and "[a]s the Nevada Supreme Court has suggested, it would be more appropriate for these death penalty matters to be handled by attorneys within a medium to large firm, where more

resources and time can be allocated without overburdening a single practitioner." *Id.*

At the hearing on Picker's motion to withdraw, Edwards emphasized the need for co-counsel, noting, "I came into this case at the request of Marc Picker, and that's really why I took it. *So, frankly, I wouldn't be comfortable moving ahead without him*." 12AA02577 (emphasis added). Picker again described trying to find replacement counsel: "I have spoken to a number of people, and quite frankly, I'm having the same problem that you had last year, which is that there's not a lot of people eager to take on this case." 12AA02579. Picker agreed with Edwards's assessment the experienced counsel was necessary. *Id.*

Edwards confirmed that he, also, had difficulties trying to find replacement counsel for Picker:

> When Marc informed me that he wanted out, I looked around and tried to see if I could find somebody to take his place, and the few people that I have had prior co-counsel experience with in these kinds of cases . . . neither of those two people wanted anything to do with this case.

13AA02582.

The following week Edwards explained that he still was not able to find replacement counsel. 13AA02584. Edwards volunteered to stay on the case and "do it myself with a paralegal." 13AA02585. The court accepted. *Id.* Nine months later, in October of 2003, Edwards moved to have his paralegal—who had just passed the bar—appointed as co-counsel on the case. 13AA02588. The court granted this request. 13AA02591.

### 2. Vanisi's bizarre behavior in prison led to counsel requesting a competency hearing.

After almost a year of little activity in the case, counsel filed a motion to stay the proceedings because, once again, Vanisi's mental health had become "questionable." 13AA02594. Both counsel proffered matching affidavits:

> 4. That during the visit on June 9, 2004, VANISI's mental state and erratic behavior prevented counsel from obtaining any meaningful assistance towards the preparation of his Supplement to his habeas petition;
>
> 5. Specifically, your affiant observed VANISI in an extremely manic and agitated state, both verbally and physically. Morever, VANISI appeared delusional in his statements to counsel.
>
> 6. Your affiant observed VANISI unable to sit still for any meaningful length of time; Instead,

VANISI moved all over the interview room, sometimes laying down on the ground, scooting along the floor, pacing the room, and extremely animated in his behaviors;

7. Upon information and belief, VANISI is on forced medication;

8. Your affiant observed VANISI make outlandish claims regarding his own thoughts, behaviors, and imagined powers. Your affiant took notes during the visit regarding the same;

9. VANISI broke out into song numerous times during the interview, seemingly out of the blue and without any relevance to the subject matter at hand;

10. Further, VANISI more than once attempted with some success to partially undress during the interview;

11. Also, VANISI claimed that he had not slept in 8 days prior to the date of the interview;

12. VANISI once stated that he would like to be "Dr. Pepper";[14]

13. Further, VANISI stated that he is an independent sovereign and that certain guards have lost their authority to govern him.

14. Also, VANISI repeatedly explained that he had to make the prison guards and others around him "understand his ways";

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[14] As discussed below, a thorough investigation of Vanisi's past would have revealed that Vanisi's mental illness had, at least once before, fixated on Dr. Pepper. *See* § III.D.1.a below; *see also* 26AA05416 ¶23 ("Whenever he talked to Siaosi about seeking help, Siaosi always said, 'Okay, let me consult with my doctor', and then he'd go into his room, close the door and Michael heard him talking like he was on the phone . . . To his surprise, when he walked into Siaosi's room, he saw Siaosi holding an in depth and serious conversation with a bottle of Dr. Pepper that he had on his dresser.").

15. VANISI reported that he has taken to blindfolding himself in the yard when he is running and doing his workouts and is thereby forced to feel his way around. VANISI explained, "I do my motions; I do my movements." VANISI also reports to standing on his head in the yard;

16. Also, VANISI claimed that he needed the blindfold to "get his head right";

17. Further, VANISI claims to have been naked in the yard in the snow making snow angels.

18. VANISI apparently has new glasses. He explained that they allow him to see things in "high definition["];

19. Additionally, VANISI repeatedly snarled like a wild animal whenever asked to do something that doesn't fit "his way"—including when relating a story, as well as when counsel asked certain things of him;

20. VANISI also seems to be delusional regarding how others view him;

21. VANISI also claimed to have stayed outside in the yard all night long in April of 2004;

22. Further, VANISI related that he had a total of six write-ups in April of 2004;

23. Also, several times during the interview, VANISI made random statements which, although somewhat poetic in their form, were basically unintelligible. For example, quite out of context, VANISI proclaimed, "My identity itself causes you violence. You hang up my picture in silence."

13AA02604–06; 13AA02600–02.

The court expressed skepticism about Vanisi's incompetence, but ordered an evaluation. 13AA02639 ("I am familiar with Mr. Vanisi, and I'm very familiar with his activities at the trial time, and he was evaluated and competent. So I'm not convinced that Mr. Vanisi is incompetent."); *see also* 22AA04582.

Before the competency hearing, the court summoned counsel because Vanisi refused to see one of the experts, Dr. Amezaga. The court explained how hard it was to find experts to evaluate Vanisi.

> The Court: Some cases we ask for the third, but I'm not sure we would in this case, because it has been very difficult to just get doctors willing to go do this.
>
> Mr. Edwards: I understand.
>
> The Court: Most psychologists and psychiatrists don't want to be involved with Mr. Vanisi. So we have Dr. Amezaga.

13AA02658. Post-conviction counsel explained that Vanisi had originally agreed to meet with the competency experts, but counsel also explained prior conversations with Vanisi about mental health experts:

> One of our first meetings with Mr. Vanisi was to do some psychological workup, mitigation-type analysis, and he was very reluctant, outright refused to do that at that time. We tried on our own to do that. And at every turn he turned us down, so as time passed, you know, I was just hoping it would get better.

13AA02659–60. The parties and the court discussed the timing of Vanisi's Haldol injections, and speculated about whether that might make Vanisi more amenable to seeing Dr. Amezaga. 13AA02660–64. The State pointed out that "there is no way to force someone to cooperate with a psychiatric or psychological examination." 13AA02665.

#### a. Vanisi's behavior was "considerably influenced by delusions and serious impairment.

At the competency hearing, Dr. Thomas Bittker testified that Vanisi was not "currently competent to participate in trial proceedings or to best assist counsel." 13AA02686. Dr. Bittker emphasized he had "relatively limited" information, but believed that Vanisi's mental illness was "severe or extreme." 13AA02686–87. Vanisi had "residual evidence of psychosis;" Vanisi also "didn't feel spontaneous," "didn't feel like he could concentrate" and "didn't feel as if he could best represent himself as how he was." 13AA02687. Dr. Bittker expressed that Vanisi's

extreme "guardedness, suspiciousness, distrust and paranoia" would make it difficult for counsel to work with him. 13AA2688, 13AA2690. Vanisi evinced "a flavor of psychosis that would warrant treatment." 13AA02690; *see also* 13AA02701 ("a very likely reason that he's not forthcoming is not rational but rather irrational and based on psychotic [sic].").

Dr. Bittker elaborated on the problem posed to counsel:

> I don't think he fully understands that in order for you to assist him that you need to understand what went on with him in his inner life as you're attempting to proceed with his appeal. I think you are still perceived as an instrument of the State and irrationally so. So there's very little that he will disclose about what went on. I can acknowledge that there may be rational reasons for him not doing this. It would make sense, one would say, if this was prior to his initial conviction. But it isn't making a great deal of sense right now.

13AA02692.

Dr. Bittker agreed that Vanisi's behavior was "considerably influenced by delusions and serious impairment and judgment." 13AA02693. During cross-examination, the State asked Dr. Bittker if

Vanisi could explain what happened on the night of the offense. Dr. Bittker answered:

> It's my opinion that two things are going on. One is I believe that he's quite confused about what went on at the crime, at the time of the crime. And secondly, I believe that because of his level of suspiciousness, pathological paranoia, the sense that this is not natural, he believes that if he discloses that to you as his defense counsel, that you are going to be harmed.

13AA02701–02. Dr. Bittker elaborated on the difficulty between a mentally ill client and his relationship with counsel:

> And I think the quality of psychosis that is relevant here is that when you're in the midst of paranoid psychosis, acknowledging that there's potential harm out there, that the world is a mix of good and evil, the paranoid psychotic can't make that distinction.

13AA02703. Dr. Bittker concluded, "So virtually everyone is a threat, virtually everyone is evil or can't understand." *Id.*

#### b. Dr. Amezaga concluded Vanisi was competent but noted Vanisi likely suffered "some form of psychoses or severe psychotic disorder."

Dr. Amezaga found Vanisi competent. 13AA02724. Dr. Amezaga noted that Vanisi was taking a "combination of medication" "usually used . . . with individuals who are experiencing some form of psychoses

or severe psychotic disorder." 13AA02729. Dr. Amezaga also agreed Vanisi "likely, is suffering from a psychotic disorder of some sort," but noted his specific task did not require reaching a diagnosis. *Id.* Dr. Amezaga emphasized: "The presence or the existence of a psychotic disorder is, really, separate and apart from the issue of competency. Just because someone is psychotic does not mean that he meets the criteria for incompetency." 13AA02736. Relying on the absence of a history of mental illness, Dr. Amezaga believed Vanisi was faking at least some of his symptoms. 13AA02761, 13AA02763–64.[15]

### 3. After finding Vanisi competent, the court gave counsel four days to file a supplement.

The court found Vanisi competent. 14AA02805. At the time only Vanisi's barebones, pro se petition was on file, which, as the State pointed out effectively had no claims. *See* 19AA03932; *see* 14AA02807 ("At this point there are no claims pending before the Court"). Before the competency hearing, the court warned counsel of its expectation

[15] As discussed below, had counsel conducted a sufficient investigation, they would have uncovered Vanisi's lengthy history of mental illness. *See* § III.D.1.a below.

that—if Vanisi was competent—counsel would be ready to file a supplemental petition soon after. *See* 13AA02642 ("I'm not going to make you file anything, but I'm ordering you to prepare it, so that depending on my ruling at the next hearing you'd be prepared to file it immediately."). The court found Vanisi competent on Friday, February 18, 2005. *See* 14AA02805.[16] The court ordered post-conviction counsel to file their supplement by Tuesday, February 22, 2005. *See* 14AA02811.

Counsel met this deadline. 19AA03954. But, as counsel would later testify—and as this Court would later find—they did not investigate possible mitigation evidence. 33AA06888–89; 33AA07015; *see also Vanisi v. Baker*, No. 65774, 2017 WL 4350947, at *2 (Nev. Sept. 28, 2017). After an evidentiary hearing, the district court denied post-conviction relief; this Court affirmed.[17] *See* 21AA04381; 21AA04555.

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[16] Vanisi sought relief from this order by requesting a writ of mandamus or prohibition from this Court; this Court denied the request. *See* 14AA02818; 14AA02833.

[17] Vanisi's mental health remained an issue up to the eve of the evidentiary hearing: counsel sought a continuance of the hearing, in part, because "Petitioner is in a drug induced state whereby he cannot perceive such simple things as the day of the week." 14AA02835.

### D. Vanisi's mental health became the primary issue during his second post-conviction proceedings.

In 2011, Vanisi filed a petition for writ of habeas corpus. Relevant here, Vanisi raised a claim that trial counsel was ineffective for failing to investigate and present evidence of severe mental illness.15AA03052–132.

#### 1. The petition alleged that substantial evidence showed Vanisi was mentally ill.

Claim One alleged that, had counsel adequately investigated Vanisi's case, they would have learned that signs of mental illness began in Vanisi's childhood and continued up to the offense, providing compelling mitigation evidence. Claim Two alleged that, had counsel conducted a proper investigation and retained appropriate experts, those experts could have offered compelling testimony in mitigation.

##### a. A lifetime of evidence was available to show Vanisi suffered from mental illness.

As a young teen, Vanisi would masturbate in front of his cousins, 28AA05961 ¶7; friends described him as unpredictable—he would begin "yelling and shouting" in the middle of conversations, 27AA05778 ¶5; he

would abruptly start doing the "Sipitau," an ancient Tonagan warrior dance, 27AA05780 ¶14.

As a young adult, friends and family noted how Vanisi would speak "incoherently" and "frequently made himself laugh at strange and inappropriate times." 27AA05728 ¶7. His hygiene deteriorated; he gained weight. 26AA05494 ¶4.

Then the personalities started. He began using different names, Perrin, Giacomo, Rocky, and others; and the names each manifested a different personality, accent, identification, and hairstyle. *See* 26AA05488 ¶3; 28AA05957 ¶¶3–5; *see also* 26AA05483 ¶17; 27AA05773 ¶10; 26AA05490 ¶21; 27AA05737 ¶6. His friends could describe and distinguish between the personalities. *See, e.g.*, 27AA05737 ¶7 ("Siaosi's personality, Sonny Brown, was the famous cool guy. Lester was the creepy guy that made everyone uncomfortable."]. One friend explained:

> Perrin was the name that Siaosi used when he was at home and around friends in Los Angeles.
>
> . . .

> Siaosi was Giacomo around the beach and certain neighborhood friends.
>
> . . .
>
> Rocky and Sonny Brown were the crazier and eccentric personalities. They both exhibited severe and sudden moods [sic] swings, and if they were upset about something they both displayed blank and empty facial expressions that caused people to fear for their safety. As time went on, Sonny Brown and Rocky increasingly became the more dominant personalities in Siaosi's mind and his behavior grew more bizarre.
>
> . . .
>
> Siaosi also had a super hero personality that he called "Super Rocky". When he was Super Rocky, Siaosi dressed in tights, women's leggings, a thick rope for a belt and a cape. Siaosi frequently went out into the community and walked around the neighborhood in this outfit.

26AA05483 ¶¶17–20.

The personalities were not the only sign of Vanisi's deterioration: "Siaosi had an imaginary friend, a god whom he called 'Lester,' that he often spoke to. Siaosi told me that Lester was a more powerful being than Jesus and the devil because Lester controlled the entire universe, whereas Jesus and the devil only had power here on earth." 26AA05485

¶33. He began collecting garbage to build a space ship, and a laser beam, so that he could leave earth "to meet Lester in another galaxy." 26AA05485 ¶33, 26AA05482 ¶13; *see also* 26AA03520 ¶23; 26AA05494 ¶5; 27AA05722 ¶3; 27AA05774 ¶17.

Vanisi's behavior at home also became more strange. One friend came home to discover Vanisi sitting alone in a corner, with a spotlight on him, "sobbing and crying out for his mother." 27AA05744 ¶17. A different friend encountered Vanisi filming himself, "sobbing and crying in the living room" and saying, "Stop" and "No daddy", as if he were a child being abused. 26AA05481–82 ¶12. Vanisi began drawing patterns and symbols on his walls, and sexually explicit images. 27AA05722 ¶4 ("The writings and scribble on his walls were all gibberish that didn't make any sense."); 27AA05739 ¶18 ("Siaosi drew several creepy images that were sexual in nature. One particular piece that stands out in my memory was an image of Satan, with long horns, having sex with a woman."); 27AA05774 ¶18; 26AA05475 ¶25; 26AA05494 ¶6.

Between 1996 and 1997, Vanisi's situation continued to worsen:

> Siaosi began speaking in tongues and other meaningless gibberish. Siaosi frequently rambled

> about biblical topics and the teachings of prophet Joseph Smith, in ways that made no sense. Siaosi often spoke in circles and it was impossible to follow or understand his point. During these incoherent conversations, Siaosi sometimes stuck out his tongue and began doing the Tongan warrior dance for no reason.

26AA05485 ¶32. Vanisi would spend hours talking to himself in the mirror in incoherent, rambling speech. 26AA05475 ¶24. He consulted with a bottle of Dr. Pepper as his doctor. 26AA05416 ¶23.[18] He would tell others that he was not from this planet, and that he needed to get back to his galaxy. 27AA05739 ¶19.

> Siaosi often spoke about having invisible alien friends who no one else could see but him. Siaosi also used to say these invisible friends were going to accompany him when he travels back to his galaxy. Siaosi was going to take these invisible friends on a mission to see whose god was the greatest. Siaosi usually had a serious look on his face when he spoke about these and other delusional matters.

27AA05739 ¶20.

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[18] This parallels an observation in initial post-conviction counsel's affidavits supporting a competency evaluation. *See* 13AA02601 ("Vanisi once stated he would like to be 'Dr. Pepper'");*see also* 13AA02605.

Part of Vanisi's delusion included a fixation on police officers, and his belief that Pacific Islanders received discriminatory treatment from law enforcement. 26AA05417 ¶32; *see also* 27AA05774 ¶15. In late 1997, Vanisi began prostituting himself to his elderly neighbor. 26AA05418 ¶36. She died of a heart attack while he was present. *Id.* Though no one suspected foul play, Vanisi began expressing a paranoid belief that he would be arrested for her death. 27AA05775 ¶22; 27AA05740 ¶26. Around this time, a cousin in Reno suggested Vanisi come visit and "mentally reset." 27AA05775 ¶24; 26AA05419 ¶39. Within two weeks of Vanisi arriving in Reno, Sergeant Sullivan was murdered.

**b. Properly prepared experts could have diagnosed Vanisi's mental illness.**

Dr. Jonathan Mack, who evaluated Vanisi for these proceedings and conducted a comprehensive review of his history, concluded Vanisi "was in a state of chronic mental illness at the time of the homicide." 31AA06565. Dr. Mack opined:

> in his mid-20's Mr. Vanisi had a psychotic break and developed a schizophrenic disorder that is best characterized as Schizoaffective Disorder

> due to both a chronic schizophrenic presentation that is separate and apart from his mood disorder, but concomitant with a Bipolar One Disorder that is primarily hypomanic/manic, with much less frequent and remote bouts of depression.

31AA06565–66. Dr. Mack explained Vanisi "remained in a psychotic and decompensated state throughout his imprisonment, with partial improvement on high doses of anti-psychotic, tranquilizing and mood stabilizing medication." 31AA06566. And, Dr. Mack emphasized Vanisi's "presentation of extreme mental illness is not something, in my opinion, that can be consistently malingered for a decade and a half. Mr. Vanisi continues to persistently hypomanic [sic] and to display some schizophrenic symptoms despite copious psychotropic medication . . . ." 31AA06568.

Dr. Siale Foliaki also evaluated Vanisi and concluded he "suffers from a chronic and disabling mental disorder known as Schizoaffective Disorder that greatly impairs his cognitive, emotional and behavioural

control and the evidence for this is unequivocal . . . ." 31AA06575.[19] Dr. Foliaki also explained a particularly salient attribute of Vanisi's mental illness: his "verbal fluency but complete lack of comprehension and capacity for self-awareness and deeper personal awareness." 31AA06579. Vanisi "demonstrates a marked incapacity to understand his own mental status" which "severely impairs his ability to understand the mental status of others." *Id.*

### 2. The district court denied relief; this Court reversed, remanded, and ordered an evidentiary hearing.

After holding an evidentiary hearing, where the only permitted witnesses were post-conviction counsel, the district court denied relief. *See* 34AA07109. Specifically, the district court found post-conviction counsel made a reasonable strategic decision to focus solely on

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[19] Dr. Foliaki, who is Tongan, also has special cultural competency in evaluating Vanisi. Relevant here, Dr. Foliaki noted "that culture plays an important part in understanding mental disorder of migrants whose cultural norms deviate significantly from the host culture." 32AA06667. Additionally, Dr. Foliaki explained that for Pacific Islanders, there is a "stigma associated with mental illness," a "lack of recognition of mental disorders" and a "lack of trust in Western medical treatment options . . . ." 32AA06668.

challenging Vanisi's competence, and to forego investigating possible mitigation evidence. 34AA07114.

This Court reversed. *Vanisi*, 2017 WL 4350947 at *2. Specifically, this Court found post-conviction counsel was deficient in relying only on competency litigation and also deficient in failing to investigate mitigation. *Id.* This Court remanded for "the district court to conduct an evidentiary hearing concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence." *Id.* at *3.

### 3. The district court found Vanisi competent and allowed him to waive his evidentiary hearing.

After remand, the district court ordered production of Vanisi. 35AA07325. Counsel moved for reconsideration, noting that in the previous proceedings, Vanisi had waived his appearance, and had also indicated to counsel that he wished to waive his appearance for the proceedings related to his hearing. 35AA07327.

The State opposed, arguing a written waiver was insufficient and that having Vanisi personally canvased would involve only minimal

disruption to Vanisi's routine. 35AA07347–55. The State attached a declaration from a caseworker at Ely State Prison indicating that a one-day court appearance would have Vanisi "transported back to Ely State Prison less than a week later." 35AA07354.

In reply, undersigned counsel cautioned that disrupting Vanisi's routine, with no guarantee of maintaining his medical regimen, "would pose a substantial disruption to Vanisi and [have] deleterious effects on his mental health." 35AA07359–60. At the hearing on this motion, undersigned counsel repeated this concern:

> Well, Your Honor, our concern is the mental health situation of Mr. Vanisi. He's been in a stable environment. The doctors finally have figured out the medication regime he needs to keep his mental health issues in check, and we are very concerned about the disruption to his routine by transporting him.

35AA07379. The State reiterated that it would be a short trip; the court also noted that it would be a short trip, and ordered Vanisi transported. 35AA07380; 35AA007388. On May 30, 2018, the court canvassed Vanisi and accepted his waiver of appearance for the evidentiary hearing. 35AA07396–400.

Vanisi was not returned to Ely until the week of July 23, 2018, almost two months later.

On July 20, 2018, just before being transported back to Ely State Prison, Vanisi wrote the court:

> Hello, Judge, how are you doing? I am doing good.
>
> I am writing you to see if I can waive my evidentiary Hearing.
>
> I am unsure of what more to write, meaning if I should explain my reason for such a wish, because all the law requires is that I make this waiver knowingly, voluntarily and intelligently.
>
> I suppose that there will be a hearing and I can give my explanation to the Court then if it wished to hear additional information.
>
> Well, Judge, I end my letter here with God Bless,
>
> Siaosi Vanisi

36AA07606. The court received the letter on July 24; the next day, the State moved to set a hearing regarding Vanisi's request. 36AA07607. Undersigned counsel filed a Suggestion of Incompetency and Motion for Evaluation. 36AA07611. In mid-August, the State filed a letter Vanisi sent directly to the district attorney's office, requesting from the State

case law on waiving his evidentiary hearing. *See* 36AA07685; *see also* 36AA07690.

At the subsequent hearing, undersigned counsel told the court Vanisi's mental health had "been an ongoing concern in our representation of him in this case." 37AA07750. Undersigned counsel described Vanisi's "ups and downs," which had "gotten to the point where lately when I speak to Mr. Vanisi's [sic] or meet with Mr. Vanisi, I don't know if I am going to be meeting high energy Mr. Vanisi or low energy Mr. Vanisi's [sic]." 37AA07550–51. Low-energy Vanisi had "slurred speech, moves slowly." High-energy Vanisi "talks so fast that he can't get the words out, and he repeats himself multiple times." *Id.*

The court expressed its impression that "Mr. Vanisi appears to be very competent" and further stated its skepticism an evaluation was necessary, but noted, "The problem I have is if I accept his, Mr. Vanisi's waiver of the hearing without a current evaluation, that an appellate court will tell me, Judge, you shouldn't have done it that way." 37AA07764–65. So the court ordered an evaluation. 37AA07766; *see also* 37AA07782.

Vanisi was evaluated by Drs. Steven Zuchowski and William Moulton.

#### a. Dr. Zuchowski diagnosed Vanisi with schizoaffective, bipolar type, but concluded that Vanisi could appreciate his position and make rational choices.

Dr. Zuchowski concluded that Vanisi suffered from schizoaffective disorder, bipolar type, in remission. 37AA07801; *see also* 37AA07850. He explained that schizoaffective disorder is a combination of schizophrenia and bipolar disorder. 37AA07846. "[U]ntreated, a person would remain to appear to have a schizophrenic type illness essentially all the time with some waxing and waning. But they would continue to have psychotic beliefs and continue to have perhaps hallucinations." *Id.* Dr. Zuchowksi explained, someone suffering from schizoaffective disorder also suffers from "mania or major depression." 37AA07847. Mania includes "the tendency to engage in risky behavior." *Id.* While he did not observe mania during his brief evaluation of Vanisi, Dr. Zuchowski acknowledged that grandiosity, and overstating the likelihood of success on appeal, could be an example of mania. 37AA07848. Dr. Zuchowski observed of Vanisi's history: "there seems to

be more evidence of mania than there is long periods of depression." 37AA07851–52.

Dr. Zuchowski explained the plethora of medication that Vanisi received: Haldol Decanoate, an antipsychotic, 37AA07853; Cogentin, to minimize the side effects of Haldol, *id.*; Abilify, another antipsychotic that sometimes augments antidepressants or acts as a mood stabilizer, 37AA07854; Trazodone, an antidepressant and sleep aid, 37AA07855, 37AA07859–60; Tegretol, a mood stabilizer, 37AA07860; and Vistapril, a mild anxiety medication, 37AA07861.

Dr. Zuchowski also highlighted a red flag in Vanisi's NDOC records:

> The main event of potential relevance to this evaluation was a documented change in Mr. Vanisi's mental status and level of cooperation in late July 2018. He was described as "paranoid", "difficulty with [word?] processing" and "more difficult to redirect.["] He expressed a desire to stop his Haldol injection on 6/20/2018 and 7/27/2018. There was some confusion about when he last received his Haldol injection. Records reflect that he received an injection on 5/12/2018 and then again on 7/3/2018. In the records that were available for my review, there was no evidence of a Haldol injection in June 2018.

37AA07797-98 (first brackets in original).[20] Dr. Zuchowski explained that missing a dose of Haldol could affect the way Vanisi viewed his attorneys' advice: "So a single missed dose could cause a deviation, a deviation in how he's doing, a change in his mental status such he would be more difficult to work with." 37AA07865.

Dr. Zuchowski ultimately concluded that Vanisi's mental illness was in remission, and that he had the capacity to make a rational choice about whether to waive his hearing. *See* 37AA07794, 37AA07799–801.

**b. Dr. Moulton acknowledged "major mental illness," but also concluded Vanisi could appreciate his position and make rational choices.**

After reviewing Vanisi's records and interviewing him, Dr. Moulton concluded Vanisi "has a serious mental illness" but "Mr. Vanisi has limited insight into the seriousness of his mental illness and the need for treatment . . . ." 37AA07810;*see also* 37AA07808 (noting

[20] This timeline correlates with Vanisi receiving a Haldol injection before leaving Ely State Prison and then missing his first shot after being transported to Northern Nevada Correctional Center. *See* 35AA07381-82; *but see* 37AA07865.

"Vanisi has a "major mental illness"); 37AA07812 ("Based on the available information, Mr. Vanisi is viewed as having a major mental illness."); 37AA07934 ("I do not believe that Mr. Vanisi is malingering and I don't question that Mr. Vanisi has a serious mental illness.").[21] Dr. Moulton repeated Dr. Zuchowski's observation that "if [Vanisi is] not treated in a timely manner, he starts to become symptomatic." 37AA07941.

Dr. Moulton also highlighted the possibility of Vanisi "faking good:" "He's telling us when we meet with him that he believes he has a serious mental illness and he needs treatment and he feels he's doing well because he's getting that treatment. And then when we review the records, there's a different picture and it suggests that that's not entirely accurate." 38AA07971; *see also* 38AA07954–55.

Like Dr. Zuchowski, Dr. Moulton acknowledged the possibility of grandiosity where a defendant believed "if you just tell your side of the

[21] Dr. Moulton noted his disagreement with prior evaluators who believed Vanisi was malingering. 37AA07936.

story to a jury and they would automatically acquit you in spite of overwhelming physical evidence of guilt." 38AA07966.

Despite acknowledging Vanisi's mental illness, Dr. Moulton concluded Vanisi could appreciate his situation, and, thus, was competent. 37AA07937–38, 38AA07994.

#### c. The district court found Vanisi competent, allowed him to waive his evidentiary hearing, then denied relief.

The court found Vanisi competent. 38AA08010.

The court also advised Vanisi:

> And I kind of want to start, Mr. Vanisi, by inquiring—I know your attorneys have told you this but I haven't told you this. *I want to tell you I don't think you should waive the hearing*. That's my thought process. I think that you have a hearing coming up, one's scheduled, witnesses are subpoenaed, your lawyers are ready to go. You should go forward with that. That's what I think you should do.

38AA08012 (emphasis added). The court elaborated: "Well, wouldn't it be better to have a hearing, just get through all those witnesses and see if it makes a difference?" 38AAA0816. Vanisi began to have energy problems: the bailiff expressed concern that Vanisi was about to fall, *id.*,

then later during the hearing, Vanisi explained he "only had two pieces of cheese to eat." 37AA08032. So the court continued the hearing to allow Vanisi to sleep on his decision. *Id.*

The next day, after canvasing Vanisi again, the court re-emphasized: "Mr. Vanisi, I've tried everything I could to try to convince you to have the evidentiary hearing." 38AA08054; *see also* 38AA08055–56 ("I think this is the wrong decision for you to make and I don't want you to make this decision."). The court then accepted Vanisi's waiver. *Id.*[22]

Because Vanisi's waiver meant he presented no evidence in support of his remaining claims, the court denied relief. 38AA08074.

#### 4. Vanisi filed a supplement asking the court to find him categorically ineligible for the death penalty.

Shortly after the court issued its oral rulings, but before the court issued its written orders, Vanisi filed a motion for leave to file a supplement to his petition. *See* 38AA08083. The supplement asked the

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[22] Counsel presented argument—supported by an ethics opinion by Professor David Siegel—that the court should conduct the hearing notwithstanding Vanisi's waiver. *See* 38AA08057; *see also* 36AA07695. The court rejected this argument. 38AA08068.

court to recognize that individuals who suffer from severe mental illness are exempt from the death penalty and that, because Vanisi suffers from severe mental illness, the court should hold him ineligible for the death penalty. 38AA08092.

The court's order, drafted by the State, found Vanisi had "waived all postconviction habeas remedies," Vanisi did not consent to filing the supplement, the claim was procedurally defaulted without a showing of good cause and prejudice, the claim could have been presented earlier, and the claim was beyond the purview of this Court's remand order. 38AA08176–79.[23]

## IV. SUMMARY OF ARGUMENT

Reliability is required to impose a death sentence. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). In applying the requirements of reliability, the

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[23] The court adopted the order verbatim, despite undersigned counsel's objections. Vanisi did not waive "all postconviction habeas remedies," but only his evidentiary hearing. *Compare* 38AA08176 *with* 38AA08036, 38AA08044, 38AA08053, 38AA08056, 38AA08068, 38AA08074 (indicating Vanisi was waiving his hearing, not all post-conviction remedies). Additionally, Vanisi did not "intimate[] that his counsel did not have his consent to add a supplemental claim." *Compare* 38AA08176 *with* 38AA08149-50.

Supreme Court has found two classes of people are categorically ineligible for execution: juvenile offenders and the intellectually disabled. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). For both, their respective status injects challenges to the reliability required by the Eighth Amendment's prohibition against "cruel and unusual punishment." *Roper*, 543 U.S. at 569; *Atkins*, 536 U.S. at 320–21. These two categories parallel common law protections, which would have considered it cruel and unusual to execute those then referred to as "infants" and "idiots." Joel Prentiss Bishop, *Commentaries on the Criminal Law* §§ 461, 468 (Little Brown 1865) [hereinafter Bishop, *Commentaries on the Criminal Law*].

But the common law recognized another category of individuals exempt from punishment, those then referred to as "lunatics." *Id.* at § 468.[24] However, those suffering from severe mental illness are not categorically protected from the death penalty, though similarly

[24] Because the terms "idiots" and "lunatics" evoke great stigma and prejudice, the words are disfavored and should not be repeated. Although the common law referred to protections in these terms, this brief will refer to these populations as the "mentally ill" and the "intellectually disabled" unless directly quoting a common law source.

situated to juvenile offenders and the intellectually disabled. And those who suffer from severe mental illness actually present greater challenges to reliability.

There are six reasons that those who suffer from severe mental illness—already recognized by *Atkins* and *Roper*—should be categorically exempt from the death penalty. First, individuals who suffer from severe mental illness have a compromised ability to cooperate with counsel. Second, their mental illness makes them a poor witness. Third, severe mental illness causes distortions in thinking that result in poor decision-making. Fourth, though severe mental illness should be mitigating, jurors are at great risk of considering it aggravating. Fifth, state and defense experts are likely to disagree about the severity of mental illness, creating a risk of confusing jurors. Sixth, cases where the defendant suffers from severe mental illness are often cases where the brutality of the offense might cause the jury to select a sentence infected with passion and prejudice.

This Court, construing the Nevada Constitution, should fill the gap left open by the Supreme Court's interpretation of the federal

constitution, and hold that individuals who suffer from severe mental illness are categorically exempt from the death penalty.

In the alternative, the district court erred by accepting Vanisi's waiver of the evidentiary hearing. This decision—going to how to litigate claim—is a decision of counsel, not client. Moreover, the district court erred in finding Vanisi competent, and also violated the mandate of this Court's prior order, requiring the district court to conduct an evidentiary hearing.

The district court also erred by failing to disqualify the Washoe County District Attorney's office, who either actively misrepresented that it represented the public defender's office or failed to correct the apparent misimpression of trial and post-conviction counsel.

Finally, Vanisi is entitled to relief on his claims that trial counsel were ineffective during the guilt-phase, and that he was entitled to represent himself at trial.

# V. ARGUMENT

## A. Because Vanisi suffers from severe mental illness, this Court should hold him exempt from the death penalty.

The evidence of Vanisi's mental illness is overwhelming. Dr. Mack and Dr. Foliaki, the first mental health experts who considered the historical evidence of Vanisi's mental illness, concluded that Vanisi suffers from schizoaffective disorder. 31AA06566; 31AA06575. The two experts appointed by the court during the most recent competency evaluation, again after reviewing Vanisi's history, both agreed his mental illness was serious. 37AA07934; 37AA07850.

In light of Vanisi's severe mental illness, it would be "cruel or unusual" to execute him. *See* Nev. Const. art. 1, § 6.

### 1. Executing someone who suffers from severe mental illness is cruel or unusual punishment under the Nevada Constitution.

Prominently placed as Article 1, the Nevada Constitution's Declaration of Rights differs from the United States Constitution, which required amendments to include a Bill of Rights. *Compare* Nev. Const. art. 1 *with* U.S Const. amends. I–X. This article, declaring the "inalienable rights" of men, comes before the articles declaring the right

to vote, the separation of powers, and the three branches of Nevada government. The placement, at the front of the constitution, conveys the convention's commitment to protecting those rights in the formation of its new government.

Section 6 of this article declares that "cruel or unusual punishments" shall not be inflicted. The phrase "cruel or unusual" had an established meaning under the common law, which prohibited the execution of certain categories of offenders, namely: children, the intellectually disabled and the mentally ill.

The law, science, and society have changed since 1864. One change, in particular is important here: The United States Supreme Court's recognition that children and the intellectually disabled are categorically exempt from capital punishment. This Court, construing the Nevada Constitution, should recognize the same for the severely mentally ill.

### a. At common law, it was "cruel or unusual" to execute children, the intellectually disabled, and the mentally ill.

The Nevada constitutional convention adopted Section 6 with almost no discussion of its meaning. *See* Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada*, 59, 782 (July 4, 1864) [hereinafter *Debates and Proceedings*].[25] The convention appreciated the need for clarity, as evidenced by Thomas Fitch's observation that the convention should not "be led into inserting in our organic law provisions or expressions which may properly be classed as ambiguous, and which, perhaps, those who come after us may find it extremely difficult to understand or explain." *Id.* at 43. The absence of substantive discussion about the Cruel or Unusual clause reflected that the term had an understood meaning.

Indeed, by the time the convention adopted this language, its use in American jurisprudence had already gone back before the adoption of

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[25] The only substantive discussion of the section was to change the language from "nor shall cruel *nor* unusual punishment be inflicted" to "nor shall cruel *or* unusual . . . ." *Debates and Proceedings* at 782. This amendment was "agreed to by unanimous consent" without discussion. *Id.*

the U.S. Constitution, to Virginia's Declaration of Rights. *See* Va. Declaration of Rights § 9 (1776); *see also* U.S. Const. amend. VIII. And the phrase's history goes back at least as far as England's Glorious Revolution of 1688–89. *See* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 996 (May 2019) [hereinafter Bessler, *A Century in the Making*].

Though contemporary scholars are not in complete agreement about the meaning of the phrase "cruel or unusual," there is agreement that it was a phrase understood under common law. This phrase encompassed a couple of concepts. It curtailed arbitrary imposition of punishment. *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 475 (Jan. 2017) ("One of the arbitrary practices Parliament wished to forbid was the imposition of what it variously called 'cruell and illegall' and 'cruell and unusuall' punishments"); *see also* Bessler, *A Century in the Making*, 27 Wm. & Mary Bill Rts. J. at 1038 ("The . . . 'cruel and unusual punishments' prohibitions in the English Bill of Rights were, consequently seen from a very early date—

as Blackstone made clear—as restricting the *arbitrary or discretionary* sentencing authority of abusive judges." (emphasis in original)); John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW J. L. & Soc. Pol'y 307, 334 (Spring 2018) ("Blackstone saw the prohibition against cruel and unusual punishment as constraining *arbitrary* and *discretionary* power." (emphasis in original)).

"Cruel or unusual" also encompassed the concept of being contrary to "long usage" or "immemorial usage." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (Fall 2008); *see also id.* at 1814–15 ("courts of the first half of the nineteenth century shared the Framers' understanding that the word 'unusual' in the Cruel and Unusual Punishments Clause meant 'contrary to long usage.' They generally upheld punishments that were consonant with common law precedent and were willing to strike down those that were not . . . .").

Members of the Nevada convention were familiar with and regularly referred to the common law in their deliberations. *See, e.g.*, *Debates and Proceedings*, at 681, 701, 719. In determining, for example, the right to trial by jury, references to the common law were explicitly made to construe the words they included in the Declaration of Rights. *See, e.g., id.* at 198 ("resort must be had for construction to what is understood by the common law right of jury trial"). Indeed, the Nevada Constitution, by reference, adopted Nevada's territorial law, which stated that "the common law of England, so far as not repugnant to, or inconsistent with, the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory." *See Van Sickle v. Haines*, 7 Nev. 249 (1872) (citing Nev. Stats. 1861 at 1); *see also* Nev. Const. Art. 17 § 2.[26] Thus, when the convention adopted Article 1, Section 6, they must have understood the prohibition against "cruel or unusual" punishment to incorporate common law protections.

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[26] The contemporary counterpart to this statute was adopted in 1911. *See* NRS 1.030; *see also* 1911 Nev. Stat. 100 (Chapter 84); Rev. Laws of Nev. §5474 (1912).

That the common law informed the meaning of Nevada law is confirmed by the early Nevada Supreme Court, which noted it was "established doctrine that [the common law] is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors." *Hamilton v. Kneeland*, 1 Nev. 40, 55 (1865); *Burling v. Goodman*, 1 Nev. 314, 318 (1865) ("We have in this state adopted the common law . . . ."); *see also State v. Sales*, 2 Nev. 268 (1866) (recognizing that under Nevada law, "all offenses recognized by the common law as crimes, and not herein enumerated, shall be punished . . . .").

Thus, this Court, in construing the meaning of the prohibition against cruel or unusual punishment, must start with the common law. Here, one component of the common law is particularly helpful: the prohibition against punishing infants, the intellectually disabled, and the mentally ill.

#### (1) The common law prohibited punishing infants for crimes.

"[A]t common law, a child under seven years of age is conclusively presumed incapable of committing any crime of any sort." Bishop,

*Commentaries on the Criminal Law* § 461. But this rule did not prevent all "infants"—defined as a person under the age of twenty-one, *see id.* § 460—from punishment. For children between the ages of seven and fourteen, the common law presumed the child incapable, but this presumption could be overcome; for children over fourteen, there was a presumption that a child was capable. *Id.*; *see also* 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 2 at 15 (1736 ed.); *see also* 4 William Blackstone, *Commentaries* *23.

This rule reflected dual realities. On the one hand, "[t]he period of life at which a capacity for crime commences is not susceptible of being established by an exact rule, which shall operate justly in every possible case." Bishop, *Commentaries on the Criminal Law* § 461. On the other: "justice seems best promoted by the existence of some rule." *Id.* Regardless, the common law acknowledged the reduced moral culpability of children.

### (2) The common law prohibited punishing the intellectually disabled and the mentally ill for crimes.

Similarly, at common law, it would have been considered cruel to execute the intellectually disabled or the mentally ill.[27] *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L. J. 2746, 2756 (June 2015) [hereinafter Clemente]; *see also* 2 *The Reports of Edward Coke* 572 (Joseph Butterworth & Son 1826) (editor's note (c): "The law is now settled that idiots and lunatics are not punishable by any criminal prosecution whatsoever, for acts committed under these incapacities."); *see also* 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 4 (1736 ed.); *id.* at 33 ("for whether the party that is supposed to commit a capital offense be thus found an idiot, madman, or lunatick, or not, yet if really he be such, he shall have the

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[27] As Clemente notes, the distinction between the intellectually disabled and the mentally ill under the common law was somewhat amorphous, as the terms tended to be listed together under the umbrella term *non compos mentis*, and were both raised as an "insanity" defense. *See* Clemente, 124 Yale L. J. at 2771; *see e.g.,* 2 *The Reports of Edward Coke* 572 ("And it must be known, that there are four manners of *non compos mentis*: 1. Idiot or fool natural. 2. He who was of good and sound memory, and by the visitation of God has lost it. 3. *Lunaticus*, *qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*. 4. By his own act, as a drunkard . . . .")

privilege of his idiocy, lunacy, or madness to excuse him in capitals."); 4 William Blackstone, *Commentaries* *24; Bishop, *Commentaries on the Criminal Law* § 468 ("A person may have arrived at mature years, but from causes temporary or permanent, natural or supervening, be destitute of the capacity essential to the exercise of that criminal intent, without which, we have seen, no offence can exist . . . . This reply is termed a plea of insanity; the word insanity being understood in its larger sense, as including idiocy and lunacy, with all other kindred forms of mental infirmity."). This Court recognized this principle in *Finger v. State*, 117 Nev. 548, 555, 27 P.3d 66, 71 (2001), acknowledging that "[f]or hundreds of years" societies have recognized the insanity defense.

As with infancy, this rule was constrained. By asking about a person's ability to form intent, the protection only applied to defendants suffering insanity at the time of the offense. *See, e.g.*, 4 William Blackstone, *Commentaries* *24 ("In criminal cases, therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities."); *see also Finger*, 117 Nev. at 555, 27 P.3d at 71.

The common law also protected a defendant from proceedings and execution if he became insane. *Id.*; *see also Ford v. Wainwright*, 477 U.S. 399, 406–08 (1986) (describing common law protections for one who became insane before execution, and noting, "The bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . . ."); 4 William Blackstone, *Commentaries* *24–25.

Again, this rule reflected the then-prevailing understanding of mental illness. However, as noted in a treatise close in time to the adoption of the Nevada Constitution, this understanding was still rudimentary. Bishop, *Commentaries on the Criminal Law* § 470 (noting "the diseases and imperfections of the mind were little understood by the medical faculty, still less by the community at large, as indeed there yet remains much to be learned" and further noting the common law "is so often imperfectly developed in [insanity] adjudications, that the principles which are immutable are not in them easily distinguished from views of the facts of insanity . . . ."); *see also Finger*, 117 Nev. at 556–57, 27 P.3d at 72–73 (discussing historical debate about definition of insanity).

Nonetheless, the protections for infants, the intellectually disabled, and the mentally ill—however limited in understanding—recognized the general principle that the less capable were less culpable. *See, e.g.*, 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 2 at 15 (1736 ed.) ("because the liberty or choice of the will presupposeth an act of understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of understanding, there is no free act of the will in the choice of the things or actions."). And in adopting the prohibition against "cruel or unusual punishments," the Nevada Constitutional convention must have understood that Nevada law would recognize this principle too.

**b. Protections for infants and the intellectually disabled were expanded because the common law was insufficient.**

The common law's qualified protections notwithstanding, current law prohibits the execution of juvenile offenders and the intellectually disabled. *Atkins*, 536 U.S. 304 (2002); *Roper*, 543 U.S. 551 (2005). This expansion of protections for infants and the intellectually disabled was necessary for two reasons: First, these offenders are less culpable.

Second, reliability is required for death sentences, and reliable determinations do not occur for these defendants. Both recognitions have their roots in the United States Supreme Court's construction of the prohibition against "cruel and unusual" punishments. [28]

The Supreme Court's 1972 moratorium occurred because states were imposing the punishment with too much randomness. *See Furman v. Georgia*, 408 U.S. 238, 242 (1972) (noting discrimination), 277 (noting arbitrary infliction), 309 (noting death penalty as random as being struck by lightning), 313 (noting inability to distinguish cases where death imposed versus not), 364–65 (noting discrimination). The Court later reversed itself once states had crafted new death penalty statutes with sufficient guarantees of reliability. *See Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976).

What emerged was a system of guided discretion: jurors would consider the facts of the offense, but they would also consider

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[28] Vanisi cites United States Supreme Court cases for two purposes in support of his Nevada constitutional argument: first as persuasive authority as to the meaning of the "cruel or unusual" clause under the Nevada Constitution and second, as binding authority for the requirements of federal law, which this Court should consider in construing the Nevada constitution.

"appropriate aggravating and mitigating circumstances." *Id.* at 196. The Court explicitly held as requisites of a constitutional death sentence "specific jury findings as to the circumstances of the crime or the character of the defendant." *Id.* at 198. Nevada's scheme reflects this process. *See, e.g.*, NRS 175.552, 200.033.

The Supreme Court has repeatedly emphasized the importance of mitigation evidence and how an "individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality) (Burger, C.J., Stewart, Powell, Stevens, JJ.); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'"). The Eighth Amendment requires reliability; reliability requires consideration of mitigation.

But, the Supreme Court has recognized, this reliability is undermined in cases with two kinds of defendants: the intellectually disabled and juveniles.

### (1) Intellectually disabled defendants undermine the reliability required to prevent a cruel and unusual sentence.

In *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), the Supreme Court held that it is cruel and unusual to execute the intellectually disabled. Two aspects of the *Atkins* opinion are helpful in construing the words "cruel" and "unusual." First, the Supreme Court recognized that intellectually disabled defendants presented a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 320 (quoting *Lockett*, 438 U.S. at 605). The court listed a number of reasons why this risk was enhanced for the intellectually disabled:

1. The "possibility of false confessions," *id.*;
2. The "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors," *id.*;

3. The lesser ability "to give meaningful assistance to counsel," *id.*;

4. The intellectually disabled "are typically poor witnesses," *id.* at 321;

5. "[T]heir demeanor may create an unwarranted impression of lack of remorse for the crimes," *id.*; and

6. Intellectual disability "as a mitigating factor can be a two-edged sword that may enhance the likelihood" that the jury worries about future dangerousness. *Id.*

In light of this "special risk of wrongful execution," the Supreme Court concluded that executing an intellectually disabled person would be "cruel and unusual" under the federal constitution. *Id.*

Second, *Atkins* recognized that the two justifications for execution—retribution and deterrence—were not served by executing the intellectually disabled. *See id.* at 318–19.[29] Specifically, and

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[29] Traditional theories of punishment refer to four justifications: incapacitation, deterrence, retribution, or rehabilitation. *See Ewing v. California*, 538 U.S. 11, 25 (2003). But incapacitation and rehabilitation are served just as well by the death penalty as by life without the

consistent with the common law's view, the intellectually disabled are less culpable, thus there is no retributive purpose. *Id.* at 319. And the "same cognitive and behavioral impairments that make these defendants less morally culpable" also "make it less likely that they can process the information of the possibility of execution as a penalty . . . ." *Id.* at 320. Thus, deterrence is also not served.

**(2) Juvenile defendants undermine the reliability required to prevent a cruel and unusual sentence.**

These two points emerged again when the Supreme Court analyzed whether it is "cruel and unusual" to execute juveniles. First, the Court again expressed concerns about the ability to reliably determine whether juveniles were, in fact, the worst of the worst, as required by the Eighth Amendment: "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient

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possibility of parole, so the Supreme Court only looks to deterrence and retribution as factors justifying death. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting).

culpability." *Roper*, 543 U.S. at 573. Specifically youthful offenders present three risk factors that undermine reliability:

1. Their immaturity and "underdeveloped sense of responsibility" are qualities that "often result in impetuous and ill-considered actions and behavior," *id.* at 569;
2. "[T]he brutality or cold-blooded nature of any particular crime might overpower mitigating arguments," *id.* at 573;
3. The difficulty for experts to distinguish between "transient immaturity" and "irreparable corruption," *id.*

The Court concluded that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.[30]

Second, the Court, repeating its analysis of penological purposes for execution, concluded that executing juveniles was not justified. *Roper*, 543 U.S. at 571. Juveniles are less culpable than adults, thus

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[30] As the Court would later recognize, these issues tie directly to problems counsel have in representing juveniles, motivated by juveniles' "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects . . . ." *Graham v. Florida*, 560 U.S. 48, 78 (2010). These, in turn, "can lead to poor decisions by one charged with a juvenile offense." *Id.*

retribution cannot justify execution; no evidence suggests that executions deter juveniles, thus deterrence also cannot justify execution. *Id.*

**(3) The Supreme Court's holdings specify six factors that bear on whether a group should be exempt from the death penalty.**

*Atkins* and *Roper* designate six factors to consider in determining whether a defendant of a particular status can be reliably sentenced to death: (1) whether the status impairs the defendant's ability to cooperate with counsel, *Atkins*, 536 U.S. at 320–21; (2) whether the status renders the defendant a poor witness, *id.* at 321; (3) whether the status causes distortions in the defendant's thinking that increase the chances of poor decision-making, *Roper*, 543 U.S. at 569; (4) whether the status has a double-edged nature as mitigation, *id.* at 573, *Atkins*, 536 U.S. at 321; (5) whether the complexity and conflicting views of experts are likely to generate confusion and misunderstanding among jurors, *Roper*, 543 U.S. at 573; and (6) whether the status increases the likelihood of brutality in the offense, which in turn might preclude jurors from considering the mitigation, *id. See* Scott E. Sundby, *The*

*True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 511 (Dec. 2014) (identifying these six factors).

The application of these six factors demonstrates that someone who suffers from severe mental illness should be exempt from the death penalty. Thus, this Court should recognize that it is cruel or unusual to execute someone who suffers from severe mental illness.

**c. Defendants who suffer severe mental illness face a great risk of an unreliable death sentence.**

This Court has recognized that creatures of the common law are not static. *See Bullion Monarch v. Barrick Goldstrike*, 131 Nev. 99, 102, 345 P.3d 1040, 1041 (2015) (en banc). And further, even where "[o]ur Constitution may have adopted the common-law rule," the Nevada Constitution "did not freeze the rule's application." *Id.* Common law rules—even if adopted by the Nevada Constitution—are "subject to amendment, modification and abrogation by the courts if current conditions so dictate." *Id.* (quoting *Rupert v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974).

Construing Art. 1, § 6, and in light of what current conditions dictate, this Court should modify the common law protection for the insane: recognizing the challenges to reliability posed by someone suffering from severe mental illness, this Court should hold that a person suffering from severe mental illness is categorically exempt from the death penalty.

As discussed above, under § 6, it would be cruel or unusual to execute someone who was insane at the time of the offense, during the proceedings, or at the time of execution. *See* Argument § A.1.a, above. In contemporary terms, these protections are the "not guilty by reason of insanity" defense, right to competence during trial proceedings, and the prohibition against executing the insane. *See Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001); *Calvin v. State*, 122 Nev. 1178, 147 P.3d 1097 (2006); *Ford v. Wainwright*, 477 U.S. 399 (1986).

But these common law protections do not reflect contemporary needs for reliability in capital cases. Just like the common law protections for children and the intellectually disabled did not ensure reliable death sentences, the common law protections for the mentally

ill do not ensure reliable death sentences. Indeed, the six factors flowing from *Atkins* and *Roper* demonstrate how severe mental illness—like intellectual disability and being a juvenile—prevents a reliable adjudication. And for severe mental illness, the case for a categorical exemption is stronger.

The six factors also suggest three approaches to defining the term "severe mental illness." First, this Court does not need, in the present case, to define "severe mental illness," because there can be no question that Vanisi suffers from severe mental illness, as evidenced by the fact that every expert to evaluate Vanisi, who also had access to Vanisi's history, described Vanisi's mental illness as "severe" or "major." 31AA06566; 31AA06575; 37AA07934; 37AA07850.

Second, this Court could adopt the narrowest definition of "severe mental illness" recognized by the American Bar Association and the American Psychological Association. American Bar Association, Death Penalty Due Process Review Project, *Severe Mental Illness and the*

*Death Penalty* (Dec. 2016) [hereinafter ABA, *Severe Mental Illness*]. [31] Under this definition, severe mental illness "refers to a narrower set of diagnoses than mental illness," namely "mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (e.g., lasting at least a year); and that result in comparatively severe impairment in major areas of functioning." *Id.* at 9 (quoting American Psychological Association, *Assessment and Treatment of Serious Mental Illness*, at 5 (Aug. 2009)).[32] This definition provides three elements: one of the enumerated diagnoses (schizophrenia; bipolar I disorder; and major depression),

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[31] ABA, *Severe Mental Illness* is available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last accessed on Sept. 25, 2019).

[32] American Psychological Association, *Assessment and Treatment of Serious Mental Illness* (Aug. 2009) is available at: https://www.apa.org/practice/resources/smi-proficiency.pdf (last accessed on Sept. 10, 2019). The American Psychological Association recognizes that the "lack of appropriate resources for people with serious mental illness is increasingly recognized as a systemic problem." *See* American Psychological Association, *Assessment and Treatment of Serious Mental Illness*, https://www.apa.org/practice/resources/treatment-mental (last accessed on Sept. 25, 2019).

that is relatively persistent, and that results in comparatively severe impairment in major areas of functioning. *Id.* at 9, 11–12.[33]

As a third option, this Court could adopt the six factors identified by Professor Sundby and hold that a mental illness qualifies as severe mental illness if, applying the six factors, it poses too high a risk of an unreliable sentence. Under any of these three approaches, Vanisi's mental illness qualifies as a "severe mental illness."

**(1) Vanisi's severe mental illness impairs his ability to work with his attorneys.**

*Atkins* recognizes that a defendant's intellectual disability undermines counsel's ability to represent the defendant, in turn undermining the reliability of the sentencing determination. *See Atkins*, 536 U.S. at 320–21. This concern applies with equal force to those suffering severe mental illness. Clients suffering mental illness will often resist the label, straining the relationship with counsel. Sundby, 23 Wm. & Mary Bill Rts. J. at 513–14. For example, in the

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[33] Schizoaffective disorder, being "a chronic mental health condition characterized primarily by symptoms of schizophrenia and symptoms of a mood disorder, such as mania and depression" would be a qualifying diagnosis because "it shares symptoms" with both schizophrenia and bipolar disorder. ABA, *Severe Mental Illness*, at 11.

"Unabomber" case, the defendant "was represented by a talented and experienced team of lawyers, but he repeatedly tried to dismiss them because they wanted to present his mental illness as mitigation, the evidence that presented the best chance for a life sentence." *Id.* at 514. This problem is exacerbated by a mentally ill client's compromised thinking process and the unpredictable effect of medication. *See, e.g.*, American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders* 105 (5th ed. 2013) (delusions or hallucinations part of diagnostic criteria for schizoaffective disorder).

These concerns are exemplified here. Each team of attorneys to represent Vanisi has encountered difficulties working with him, attempted to avail themselves of the only legal remedy—challenges to his competency—and, ultimately, failed to present Vanisi's mitigation evidence. Two preliminary points are important to note here: the fact of Vanisi's mental illness and the overwhelming evidence in support of that fact.

First, Vanisi suffers from schizoaffective disorder. 31AA06566; 31AA06575. For Vanisi, this disorder "greatly impairs his cognitive,

emotional and behavioural control," and "is associated with significant cognitive deficits." 31AA06575, 31AA06577. One unique aspect of Vanisi's presentation is his comparative strength in verbal fluency, which gives him the ability to "converse legibly" about topics for which his understanding is "severely impaired." 31AA06578 ("In other words his intelligence should not be judged from his conversational ability alone and he is in fact well below that of the normal person meaning he is actually far from the 'intelligent' person often described in other evaluations.").

In 2011, when Dr. Mack evaluated Vanisi, Dr. Mack noted that Vanisi "has been, defacto [sic], treated for both psychotic and mood disorder for years with massive doses of anti-psychotic and mood stabilizing medication with partial, yet very incomplete improvement." 31AA06566. Vanisi suffers from "significant, moderate to severe neurocognitive dysfunction/impairment," and "[n]europsychological markers of brain damage are very significant." 31AA06567. Vanisi also "has evidence of severe executive-frontal dysfunction with a very significant perseverative tendency, impaired complex sequencing,

impaired concept formation, and impaired non-verbal abstract reasoning." *Id.*[34]

Second is the overwhelming evidence supporting Vanisi's mental illness. As summarized above—and as presented in Claim One—many lay witnesses were available to provide historical evidence of Vanisi's mental illness. *See* § III.D.1.a above; *see also* 15AA3052. Drs. Mack and Foliaki reviewed declarations from these witnesses, and relied on those declarations in reaching appropriate diagnoses of Vanisi. *See* 31AA06501–36; 31AA06597; *see also* 15AA03122. Every expert who has had access to this historical evidence has agreed that Vanisi's mental illness is serious; three out of four of these experts agreed on a diagnosis of schizoaffective disorder, while the fourth declined to diagnose anything. 37AA07934; 37AA07850; 31AA06566; 31AA06575.

[34] Dr. Mack's conclusions were based on testing he did with Vanisi in October of 2010, long after the prison started medicating Vanisi. *See* 31AA06500. Thus, the impairments observed by Dr. Mack exist even while Vanisi is medicated. *See* 31AA06569 (noting Vanisi was "still under intensive medication" at time of report).

In sum, Vanisi suffers from severe mental illness; that, in turn, has interfered with counsel's ability to present the overwhelming evidence of his mental illness.

#### (a) Vanisi would not cooperate with counsel before his first trial, resulting in a mistrial.

Before his first trial, counsel informed the court that Vanisi was "washing himself in his own urine," "dancing naked," and "talking gibberish." 23AA04888. Though the court found Vanisi competent, counsel had great difficulty working with Vanisi, noting that he was "attempting to sabotage his defense team," "would refuse to sign documents," and repeatedly asked the same question waiting for the answer he sought. 19AA03865; *see also* 23AA04929. Counsel viewed Vanisi's desired defense theory to be "not workable," but ultimately pursued that defense. 19AA03866, 19AA03878. A mistrial resulted. 25AA05332. The mistrial, which occurred before the penalty-phase, mooted the issue of whether trial counsel had prepared to present evidence of Vanisi's mental illness.

### (b) Vanisi would not cooperate with counsel before his second trial, resulting in almost no evidence of mental illness being presented.

Before his second trial, Vanisi's behavior continued to pose a problem to counsel. In June of 1999, counsel explained to the court that they "haven't had a substantive conversation [with Vanisi] since March" and they couldn't "keep him on substantive issues." 24AA04995–96. Counsel summarized for the district court: "So we don't feel at this point, and I don't know quite how to put this, that he is emotionally capable of handling this hearing." 24AA04996. Counsel requested the court order Vanisi to be medicated, and emphasized that Vanisi "needs some medical help so that I can deal with him as a defense attorney . . . . And so that we can carry on these proceedings in a fairly civilized manner." 24AA05000.

Instead, the court ordered a competency evaluation and found Vanisi competent. 24AA4999; 18AA03794.

Around the same time, Vanisi tried to fire his attorneys. 17AA03479. At a hearing on Vanisi's motion, the court repeatedly attempted to get a "specific" example from Vanisi for why it was

necessary to fire his attorneys. 17AA03510–30. The court ultimately denied the motion. 17AA03543. At that same hearing, counsel again implored the court to order medication for Vanisi, explaining "You can't have a substantive conversation because once he gets a thought in his mind, that's it, and you can't give him a reasonable answer, as the Court attempted to do, because he just continues and continues and continues." 17AA03546–47.

Vanisi began receiving anti-psychotic medication, anti-depressant medication, and mood stabilizers, but counsel continued to have issues with him. *See* 18AA03665–66. Vanisi "refused to cooperate with counsel." 19AA03867. He moved to represent himself. 17AA03490.

In denying Vanisi's motion, the district court explained that Vanisi "exhibited difficulty processing information" "took an extremely lengthy period of time to respond to many of the Court's questions," "spoke out loud to himself in such a manner that it was at times difficult to determine if he was speaking for his own benefit or to the courtroom audience or the Court," had been "standing up and engaging in unsettling rocking motions," was "repeating himself over and over

again," and "has a history of aggressive and disruptive behavior while at the Nevada State Prison." 17AA3501–02.

The difficulties between Vanisi and counsel escalated, and counsel moved to withdraw. 19AA03949. Counsel informed the court multiple times that they would render ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984) if the court ordered them to continue representation. *See* 18AA03689, 18AA03691, 18AA03692. The court ordered them to continue representation. 24AA05054.

Counsel fulfilled their promise and did little during Vanisi's trial. During the guilt phase, the State's case went uncontested. *See* § III.B.5 above (summarizing guilt-phase). During the penalty-phase, counsel mostly presented "good guy" evidence, some evidence of Vanisi's bizarre behavior at his sister's wedding, and one expert who testified Vanisi was "possibly bipolar disorder." *See* § III.B.6 above (summarizing penalty-phase). The jury sentenced Vanisi to death.

Thus, though the court considered Vanisi's mental illness as part of its competency determination, the jury could not consider the historical evidence of Vanisi's mental illness or the appropriate

diagnosis of this mental illness because counsel did not develop or present this evidence.

**(c) Vanisi would not cooperate with his initial post-conviction counsel, resulting in almost no evidence of his mental illness being presented.**

During post-conviction proceedings, counsel indicated that "VANISI's mental state and erratic behavior prevented counsel from obtaining any meaningful assistance towards the preparation of his Supplement to his habeas petition . . . ." 13AA02604. Vanisi refused any kind of "psychological workup, mitigation-type analysis." 13AA02659–60. Counsel focused their entire case on challenging Vanisi's competence, resulting in the failure to investigate Vanisi's case. *See Vanisi*, 2017 WL 4350974, at *2.

Thus, though the court considered Vanisi's mental illness as part of its competency determination, the court could not consider on its merits the historical evidence of Vanisi's mental illness or the appropriate diagnosis of this mental illness because counsel did not develop or present this evidence.

### (d) Vanisi would not cooperate with undersigned counsel, resulting in almost no evidence of his mental illness being presented.

After this Court ordered an evidentiary hearing on Vanisi's mitigation evidence, *see id.*, Vanisi and his counsel, again, encountered difficulties. Vanisi indicated a wish to waive his evidentiary hearing. 36AA07605. Undersigned counsel requested a competency hearing, noting Vanisi's high- and low-energy moods were fluctuating more often, he appeared to have delusions about his case, and counsel had doubts about whether they were able to rationally communicate with Vanisi. 37AA07750–51. The court granted a hearing, but found Vanisi competent. 37AA07782; *see also* 38AA08010.

After advising Vanisi that waiving the post-remand evidentiary hearing was a bad idea, the court allowed Vanisi to waive the evidentiary hearing. 38AA08012, 38AA08016; *see also* 38AA08054, 38AA08055–56. Thus, though the court considered Vanisi's mental illness as part of its competency determination, the court could not consider on its merits the historical evidence of Vanisi's mental illness

or the appropriate diagnosis of this mental illness because Vanisi waived the hearing.

And, because the evidentiary hearing was Vanisi's last chance to vindicate his right to the effective assistance of trial counsel during the penalty phase—through the limited gateway established in *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997)—no factfinder in Vanisi's case has had the opportunity to weigh his mental illness as mitigation evidence.

**(2) Vanisi's severe mental illness renders him a poor witness.**

*Atkins* acknowledged that intellectually disabled "defendants are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 320–21. The mentally ill are prone to outbursts, making inappropriate comments, or engaging in disruptive behavior. Jurors who witness such outbursts "are likely to interpret the defendant's actions as demonstrating a lack of remorse and an impulsivity that is dangerous."

Sundby, 23 Wm. & Mary Bill Rts. J. at 515.[35] These same concerns apply to Vanisi's case.

First, Vanisi lacks self-awareness of his mental illness, rendering him an unreliable narrator. Dr. Foliaki observed that part of Vanisi's "psychiatric presentation" is a condition known as "alexithymia" or "an inability or difficulty describing or being aware of one's emotions." 31AA06579. "Alexithymia dominates Mr. Vanisi's mental status examination and demonstrates a marked incapacity to understand his own mental status and by default severely impairs his ability to understand the mental status of others." *Id.* This came up again during Vanisi's most recent competency evaluation. Dr. Moulton explained that Vanisi appeared to be "faking good" during his evaluation. Namely, the records indicate Vanisi's denial of his mental illness, evidenced by his attempt to get off of forced medication. 38AA07971. During the examination, Vanisi was willing to acknowledge his mental illness and need for treatment, but only because it served his goal. *See id.*

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[35] Citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538, 1563, & n.22 (1998).

Second, Vanisi was in a state of "florid psychosis" at the time of the offense. *See* 31AA06594; *see also* 31AA06565 ("At the time of the homicide, Vanisi had delusional and perseverative thinking about the need to kill a police officer . . . ."). His compromised thinking at the time of the offense in turn compromised his thinking about his own defense and the efficacy of him serving as his own witness. *See* 32AA06714 ¶9 ("The entire time that we represented Mr. Vanisi, he indicated that he wanted to testify on his own behalf."); 32AA06717.

Third, in denying Vanisi's request to represent himself, the court's observations that he appeared to have difficulty processing information, took too long to respond to questions, spoke out loud to himself, engaged in "unsettling rocking motions," and repeated himself over and over, are all the kinds of behaviors jurors perceive as lacking remorse or posing a danger. *See* 17AA03501–02; *see also* Sundby, 23 Wm. & Mary Bill Rts. J. at 515.

### (3) Vanisi's severe mental illness causes distortions in his thinking process that are likely to produce bad decisions.

*Roper* recognized that juveniles' immaturity could "often result in impetuous and ill-considered actions and behavior." 543 U.S. at 569. Severe mental illness, almost by definition, increases the chances of bad decision-making. "[T]he reliability of the penalty phase can be jeopardized because of the necessity of relying on a mentally ill defendant to make key strategic decisions involving constitutional rights." Sundby, 23 Wm. & Mary Bill Rts. J. at 516.

It is no exaggeration to refer to this case as a series of ill-considered actions and behaviors resulting from Vanisi's impaired decision-making processes. Before the first trial, and against the advice of counsel, Vanisi insisted on presenting a defense that someone else committed the offense—leading to a mistrial. *See* 19AA03866, 19AA03867; *see also* 25AA05332. Before the second trial, the same disagreement arose, and counsel moved to withdraw. 19AA03949. Counsel indicated they could not present any defense because of Vanisi's commitment to testifying in support of the "other guy did it"

defense. *See* 18AA03699–700. In reliance on Vanisi's intent to testify, counsel did not challenge the State's case. *See* § III.B.5 above; *see also* 32AA06717 ¶14; 32AA06714 ¶9. But when the time came, Vanisi declined to testify. 8AA01610 ("All along I wanted to testify. This is a joke. I am not going to testify.").

During the most recent post-conviction proceedings, the court alerted Vanisi that he was making a bad choice in waiving his hearing. 38AA08012 ("I want to tell you I don't think you should waive this hearing."); 38AA0816 ("Well, wouldn't it be better to have a hearing, just get through all those witnesses and see if it makes a difference?"); 38AA08054 ("I've tried everything I could to try to convince you to have the evidentiary hearing."); 38AA08055–56 ("I think this is the wrong decision for you to make and I don't want you to make this decision."). Nonetheless, Vanisi waived.

#### (4) Vanisi's severe mental illness has a double-edged nature.

*Atkins* recognized intellectual disability was a double-edged sword as mitigating evidence because it may "enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."

536 U.S. at 321. *Roper* also noted that youth could be viewed against a juvenile defendant. 543 U.S. at 573.

Severe mental illness as a mitigating circumstance raises the same difficulty: jurors may view it as aggravating. This difficulty is present in Vanisi's case, particularly because of Vanisi's jail and prison behavior before he was medicated. *See* § III.A & B above (describing bizarre prison behavior). In fact, Vanisi's behavior while incarcerated was the main thrust of the State's penalty presentation, and allowed the State to portray Vanisi as inherently dangerous—even after his detention. *See, e.g.*, 9AA01781–99 (guard describing prison behavior); 9AA01800–15; 9AA01816–25; 9AA01862–84; 9AA01820 (prison caseworker indicating Vanisi is "[v]ery volatile and very conniving and just very volatile" and a significant risk to staff and inmates). During the victim impact statements, the victim's wife raised the possibility of future dangerousness. 10AA01946 ("We must keep him forever away from our community where he would have the opportunity to hurt another family. He has devastated ours. He must never be given that chance again."). Finally, during closing arguments, the State raised

Vanisi's incarceration behavior as evidence warranting a death sentence. 12AA02437.

**(5) The complexity and conflicting views of experts who have evaluated Vanisi are likely to confuse jurors.**

Severe mental illness also poses a risk that experts might disagree, confusing the issues for jurors. *See Roper*, 543 U.S. at 573. This problem is particularly difficult because of jurors' tendency to discount defense experts, while not similarly discounting prosecution experts. Sundby, 23 Wm. & Mary Bill Rts. J. at 520. "The question . . . is not whether experts' diagnoses may sometimes be incorrect, but whether jurors are capable of sifting through the competing psychiatric testimony to determine which testimony is reliable and which is not." *Id.* at 521.

Until Vanisi's full history was available for experts, there was considerable disagreement about the severity and existence of Vanisi's mental illness. Trial counsel initially believed "that this Defendant had a screw loose and the defense would shift in that direction," but after an early examination, trial counsel concluded, "he was competent, could

assist counsel, was very aggressive, was very mean spirited and reasonably intelligent." 19AA03863.[36]

The first set of competency evaluations wavered between rule-out bipolar disorder and bipolar affective disorder. *See* 18AA03717; 32AA06741. The second set of competency evaluations, in 1999, both concluded unequivocally that Vanisi was malingering. 22AA04616; *see also* 3AA00554. During the 2005 evaluations, one expert diagnosed bipolar disorder, the other did not offer a diagnosis. 22AA04585; 22AA04594.

In 2011, Drs. Mack and Foliaki, who both received necessary historical documents and declarations from witnesses who knew Vanisi growing up, agreed that Vanisi suffered from schizoaffective disorder. 31AA06566; 31AA06575. During the 2018 evaluations, Dr. Zuchowski agreed with the diagnosis of schizoaffective disorder; Dr. Moulton

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[36] To be clear, these conclusions are unsupported. *See* 31AA06566 (discussing Dr. Lynn's report and noting, "It is inappropriate for a psychologist or mental health professional to rely on test results wherein it is not proven who took the test or whether anyone coached the examinee. Leaving the MMPI test with the prison to mail and send back violates this security protocol and also violates the test and test item security."); *see also* 31AA06575, 31AA06605.

agreed only that Vanisi suffered from a severe mental illness. 37AA07934; 37AA07850.

This history shows how the diagnosis of mental illness is complex, and, when experts do not have sufficient information, can lead to conflicting opinions. The task of understanding mental illness, even among experts, invites disagreement. Lay jurors cannot be expected to weigh and understand something that even diagnosticians disagree about.

The complexity of expert opinions surrounding Vanisi's mental health is also demonstrated by the ongoing saga of how to properly medicate him. Before the second trial, the district court expressed grave concerns about the efficacy of medicating Vanisi. The court wanted reassurance that medication would not affect Vanisi's "competency and his ability to assist counsel throughout trial," whether the medication was "being administered voluntarily," and that medication would require "periodic checks." 17AA03571. The court emphasized, "I'm very uncomfortable ordering specific medications because I'm not a physician and I think it makes it difficult for the Court to monitor it." 17AA3751–

52. The complexity of medicating Vanisi appeared as an issue again during the most recent competency hearing. *See, e.g.*, 37AA7797–98.

#### (6) The brutality of the crime could preclude jurors from properly considering Vanisi's severe mental illness.

*Roper* recognized that the "brutality or cold-blooded nature" of a particular crime posed a problem to the consideration of youth as a mitigating circumstance. 543 U.S. at 573. Severe mental illness also poses this problem. Murders committed by those suffering severe mental illness are the most likely to appear brutal. There can be no question that the brutality of the instant offense weighed heavily in jurors' minds. *See Vanisi v. State*, 117 Nev. 330, 334–35, 22 P.3d 164, 1167–68 (2001) (describing offense).

### d. No penological purpose is served by executing someone who suffers from severe mental illness.

Only two penological purposes are served by the death penalty: retribution and deterrence. *See Atkins*, 536 U.S. at 318–19. Neither of these purposes supports executing someone who suffers from severe mental illness.

Retribution does not justify executing the severely mentally ill. "[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* at 319. In *Atkins*, the Court noted that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* The same reasoning applies to someone who suffers from severe mental illness. Such a person is less culpable because his mental illness interferes with his thought processes. Indeed, this Court has recognized the long tradition that someone with a reduced mental state is less culpable. *See Finger v. State*, 177 Nev. 548, 555, 27 P.3d 66, 71 (2001).

Deterrence also does not justify executing the severely mentally ill. Capital punishment could only deter murder that is the result of premeditation and deliberation. *Atkins*, 536 U.S. at 319 (citing *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). But, the *Atkins* Court noted, someone with cognitive and behavioral impairment is, by definition, less capable of engaging in logical reasoning. *Atkins*, 536 U.S. at 320.

This is as much—if not more—the case for the severely mentally ill as it is for the intellectually disabled.

### e. It is cruel or unusual to execute someone who suffers from severe mental illness.

The common law recognized the reduced culpability of infants, the intellectually disabled, and the mentally ill, and so the common law provided special protections to these groups. Though these terms have become antiquated, the concerns motivating them have not.

Contemporary death penalty jurisprudence has already recognized the need for special protections for juveniles and the intellectually disabled, thus the death penalty is no longer available to punish these offenders. Both groups are less culpable because of their status. But another reason justifies the special protection for juveniles and the intellectually disabled: the inability to reliably classify these individuals as being the worst of the worst.

Those, like Vanisi, who suffer from severe mental illness also cannot be reliably classified as the worst of the worst. Thus, this Court should recognize that, just as the federal Constitution prohibits the

execution of juvenile offenders and the intellectually disabled, the Nevada Constitution prohibits the execution of the severely mentally ill.

#### 2. In the alternative, federal law prohibits executing Vanisi because he suffers from severe mental illness.

Even if this Court declines to hold that the Nevada Constitution prohibits the execution of the severely mentally ill, this Court must recognize that federal law prohibits the execution of someone who suffers from severe mental illness.

##### a. A reliable death penalty determination is not possible for those suffering from severe mental illness.

For all the reasons asserted above in support of an exemption under the Nevada Constitution, the federal constitution also prohibits executing anyone who suffers from severe mental illness: a reliable determination of death is not possible and no penological purpose justifies imposition of the death penalty. Vanisi incorporates Argument §§ A.1.c & A.1.d as if fully pled herein.

### b. There is a national consensus that executing individuals with severe mental illness is improper.

Excessive punishments are prohibited by the Eighth Amendment. *See, e.g., Atkins*, 536 U.S. at 311. In determining what punishment is excessive, the Supreme Court applies not "the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Id.* This assessment relies on "the evolving standards of decency that mark the progress of a maturing society." *Id.* The Court, thus, assesses whether there is a national consensus that a sentence is excessive, looking to legislation, judicial decisions, prosecution and sentencing trends, polling data, consensus among professional organizations, and the views of the international community. *See Atkins*, 536 U.S. at 316; *see also id.* at n.21.

Here, there is a rising national consensus against executing those who suffer from severe mental illness. Professional organizations agree that those who suffer from severe mental illness should be exempt from

the death penalty.[37] The international community also disfavors the execution of those with severe mental illness. ABA, *Severe Mental Illness and the Death Penalty*, at 35. Most importantly, between the states that do not have the death penalty and the actual practice of states that disfavor executing those with severe mental illness, there is a national consensus.[38]

### c. International law prohibits the execution of someone who suffers from severe mental illness.

The International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life and restricts the imposition of the death penalty in countries that have not abolished it to "only the most serious

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[37] *See, e.g.*, *Mental Disability and the Death Penalty*, American Psychological Association Council Policy Manual, Chapter IV (2006) *available at* http://apa.org/about/policy/chapter-4b.aspx#death-penalty (last visited Sept. 8, 2019); National Alliance on Mental Illness, http:www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Sept. 8, 2019); American Bar Association, *Severe Mental Illness and the Death Penalty*, at 7 (Dec. 2016), *available at* https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Sept. 8, 2019) [hereinafter ABA, *Severe Mental Illness and the Death Penalty*].

[38] *See* Death Penalty Information Center, *States with and without the death penalty* (Nov. 9, 2016), *available at* https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 8, 2019).

crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . ." Art. 6, § 2. The Covenant further prohibits the torture and "cruel and inhuman or degrading treatment or punishment" and guarantees everyone a fair and public hearing by a competent and independent, and impartial tribunal. Arts. 7, 14. These provisions prohibit the execution of someone who suffers from severe mental illness. *See* Richard J. Wilson, *The Death Penalty & Mental Illness in International Human Rights Law: Toward Abolition*, 73 Wash. & Lee L. Rev. 1469, 1485–98 (2016); *see also* ABA, *Severe Mental Illness and the Death Penalty*, at 35–36.

**3. The district court erred by denying this claim.**

First, the district court erred by accepting the verbatim proposed order of the State, which Vanisi objected to because it contained misrepresentations of the record. Those misrepresentations cannot support the district court's denial of relief.

Second, the district court found that Vanisi failed to demonstrate that he is "ineligible for the death penalty," and thus was unable to

show a miscarriage of justice to overcome any procedural default. 38AA08177. This was error because its reasoning is circular: the court essentially ruled that Vanisi cannot raise a claim he is ineligible for the death penalty because he must first show he is ineligible for the death penalty.

**a. The district court erred by accepting verbatim the State's proposed order, despite the order's misrepresentations of the record.**

In accepting in whole the State's proposed order, the district court adopted a number of misrepresentations of the record. Because the record belies the court's order, none of those bases support the district court's holding.

For example, the district court noted that "Vanisi waived all postconviction habeas remedies . . . on September 24, 2018." 38AA08176. Vanisi, however, did not waive *all* post-conviction remedies; rather, his waiver was limited to the evidentiary hearing. Vanisi stated, multiple times, his intent to waive the *hearing*.[39] The

[39] *See* 38AA08036 ("Judge, I still want to move on—move ahead with waiving my evidentiary hearing."); 38AA08044 ( "But I want to

district court also repeated this understanding of what Vanisi was waiving.[40] The court's ultimate order was an "Order Granting Waiver of Evidentiary Hearing." 38AA08157; *see also* 38AA08163–65 (finding Vanisi made a "knowing, voluntary, and intelligent" "decision to waive the evidentiary hearing on the remaining state habeas claim.").[41]

Despite this understanding and the court's actual order on the waiver, the court continued to misrepresent the record: "on January 25, 2019, at the hearing on the present motion, Vanisi personally told the Court that he still wanted to waive all further state postconviction habeas proceedings." 38AA08177. The court added that Vanisi "intimiated that his counsel did not have his consent to add a supplemental claim." *Id.* Both of these holdings are false. Vanisi had

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waive my evidentiary hearing."); 38AA08053 ("I've considered those other possibilities but I still want to waive my evidentiary hearing.").

[40] 38AA08056 ("I am going to find that you're freely and voluntarily waiving your hearing and I'll accept that waiver."); 38AA08068 ("I think that Mr. Vanisi has freely and voluntarily waived his right to have a hearing, and I do not think that there's any basis for me to deny that request."); 38AA08074 ("So you still want to do this? You still want to waive your hearing?").

[41] And the experts evaluated Vanisi to determine if he was competent to waive the evidentiary hearing, not to waive all post-conviction proceedings. *See* 37AA07794; 37AA07808.

two exchanges with the court. In the first, after exchanging pleasantries, a brief conversation occurred:

> The Court: So did you understand what everybody is arguing today?
>
> The Defendant: Yes, I do.
>
> The Court: Do you have anything you want to say about it?
>
> The Defendant: I just want to add you get a sense of what I am trying to deal with every time I get on the phone to talk about which direction I want my appeal to go in. I am glad the Court has the experience of what it is like to communicate with them. It goes on and on, Judge, and it goes on and on.
>
> The Court: Circular.
>
> The Defendant: It goes circular, right.
>
> The Court: Do you still feel the way you felt when you talked to me in September about not going forward?
>
> The Defendant: Still feel the same way.

The Court: Okay. Did you have any concern this morning? Were you confused about anything?

The Defendant: No, I wasn't confused, Judge.

The Court: All right. Thank you, Mr. Vanisi.

38AA08149–50. Notably, though the court confirmed Vanisi still did not want to have his hearing, the court did not ask Vanisi any questions about the supplement. The only other time Vanisi spoke during the hearing was to indicate his wish to stay at Northern Nevada Correctional Center until the court issued its order. 38AA08153–54.

At no time did Vanisi indicate a wish to waive all of his post-conviction proceedings. Thus, the court's holding that Vanisi's waiver encompassed this supplement is wrong and completely unsupported by the record.[42]

[42] The State's order also greatly expanded the scope of the district court's holding. The court's sole holding was that the claim was outside the scope of this Court's remand. *See* 38AA08150-51. However, the order expanded to include that the claim was procedurally defaulted and that Vanisi failed to establish a miscarriage of justice. 38AA08177-78.

### b. Procedural default does not require dismissing this claim because Vanisi is actually innocent of the death penalty.

The district court denied this claim on the basis that it is procedurally barred. 38AA08177. The district court acknowledged that one way to overcome procedural default was if petitioner could show a miscarriage of justice. 38AA08177–78. But the court held that Vanisi made "no showing that Vanisi is not death eligible—i.e., that the elements of first-degree murder have not been met and at least one aggravator does not exist." 38AA08178. The district court concluded that "Vanisi has not shown good cause to overcome the procedural bar." *Id.* The district court's analysis misconstrues this Court's decision in *Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). Thus, this Court should reverse the district court.

Nevada courts must excuse procedural default if the failure to consider a claim will result to a "fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "[T]his standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or he is ineligible for the death

penalty." *Id.* Under this exception to procedural default, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.*; *see also Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002) (finding actual innocence where there was a reasonable probability that petitioner was actually innocent of the death penalty).

Vanisi is ineligible for the death penalty: the Nevada and federal constitutions prohibit the execution of someone who suffers from severe mental illness, *see* § A.1–2 above; Vanisi suffers from severe mental illness, *see* 31AA06571, 31AA06499, 37AA07794, 38AA07808. Because Vanisi is ineligible for the death penalty, he has established a fundamental miscarriage of justice.

The district court disagreed, but only because it misapplied *Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). *See* 38AA08178. The court read *Lisle* too narrowly as indicating that "[a] defendant is eligible for the death penalty in Nevada when the elements of a capital offense and at least one aggravating circumstance have been shown." 38AA08178 (citing *Lisle*, 131 Nev. at 367, 351 P.3d at 734). Because, the district

court reasoned, a categorical exemption does not address the capital offense or the existence of aggravating circumstances, it cannot establish a miscarriage of justice.

*Lisle* cannot be read so broadly. Rather, it addressed a narrow question "of first impression," namely "can a claim of actual innocence of the death penalty . . . be based on a showing of new evidence of mitigating circumstances?" *Lisle*, 131 Nev. at 363, 351 P.3d at 730. This Court explained that capital sentencing encompasses two phases, an eligibility phase and a selection phase. *Id.* at 364, 351 P.3d at 731–32. The eligibility phase—based on the facts of the offense and the facts supporting aggravating circumstances—is based on "objective factors or conditions." *Id.* at 367, 351 P.3d at 733. Thus, the actual innocence gateway is appropriate for the offense or the aggravating circumstances because they "provide a workable standard." *Id.*

In contrast, the selection phase—based on weighing mitigating circumstances and selecting a sentence—is not objective; it "does not allow for objective standards because it is a moral determination and as such, it cannot be reduced to a scientific formula or the discovery of a

discrete, observable datum." *Id.* (internal quotation marks and citations omitted). Thus, answering the sole question before it, this Court concluded "[o]pening the actual-innocence gateway to include new mitigating evidence . . . does not present a workable analog."

But the question presented in the *Lisle* decision is not presented here. Thus, *Lisle* does not address categorical exemptions from the death penalty. Nor does the *Lisle* decision support the district court's conclusion. Indeed, *Lisle* actually supports the proposition that categorical exemptions qualify to show death ineligibility. In the eligibility-selection divide, categorical exemptions fit better in the eligibility side.

Like the elements of the offense or the elements of an aggravating circumstance, the elements of a categorical exemption are objective. *See, e.g.*, *Ybarra v. State*, 127 Nev. 47, 54–59, 274–77 (2011) (discussing elements required to establish intellectual disability); *see also State v. Boston*, 131 Nev. 981, 986, 363 P.3d 453, 456 (2015) (describing elements for relief under *Graham v. Florida*, 560 U.S. 48 (2010), in context of aggregate sentences). And, in this regard, also serve as

eligibility factors: to be eligible for the death penalty, an offender must not be intellectually disabled, or have been a juvenile offender. Here, if this Court adopts the categorical exemption against executing those suffering from severe mental illness, it will be adopting objective factors more akin to the element of the offense or the elements of an aggravating circumstance.

Additionally, like the capital offense and aggravating circumstances, categorical exemptions serve a narrowing function that is separate and distinct from the individualized consideration given during penalty selection. *See Lisle*, 131 Nev. at 365. 351 P.3d at 732. Just as a jury would not consider the death penalty if a defendant were not guilty of a capital offense and at least one aggravating circumstance, a jury cannot consider the death penalty if a defendant is categorically ineligible. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782 (1982); *see also Guy v. State*, No. 65062, 2017 WL 5484322, at *3 (Nev. Nov. 14, 2017) ("because Guy therefore is not eligible for a death sentence, allowing our prior decision to stand would result in manifest

injustice"). Thus, the district court erred in rejecting Vanisi's argument that he established a miscarriage of justice.

In the alternative, this Court's recognition of an exemption for individuals suffering from severe mental illness would itself serve as good cause to overcome any procedural default. This Court has recognized that good cause "may be established where the factual or legal basis for the claim was not reasonably available." *Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006). Here, neither the factual nor the legal basis was reasonably available because until Vanisi's final waiver, there was still an available legal mechanism for the courts of this state to consider his mitigation evidence. That is, Vanisi had an opportunity to present his mitigation evidence first at trial; then in post-conviction proceedings as an ineffective assistance of counsel claim; then, finally, in a post-conviction petition under *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). But it was only after frustrating all these means that the record became clear that a severe mental illness exemption is necessary. Moreover, the consensus of the court-appointed experts that Vanisi suffered from severe mental

illness itself provides good cause. 37AA07794, 38AA07808. Additionally, because this claim was not available sooner and the State had an opportunity to respond, the district court erred by denying leave for Vanisi to supplement his petition. *See Barnhart v. State*, 122 Nev. 301, 303–04, 130 P.3d 650, 652 (2006).[43]

### B. The district court erred by accepting Vanisi's waiver.

This Court remanded Vanisi's case "to the district court to conduct an evidentiary hearing concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence." *Vanisi*, 2017 WL 4350947, at *3. This evidentiary hearing never occurred because the district court allowed Vanisi to waive it.

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[43] The district court also held that the motion was "not within the purview of the Nevada Supreme Court's order." 38AA08179. This is wrong. Because the claim arises from the very reason that Vanisi did not have the hearing this Court ordered, it is necessarily related to this Court's order. Moreover, insofar as the district court's reference to the "purview" of this Court's order is meant to invoke the mandate doctrine, the district court erred. The mandate doctrine only prohibited the district court from acting contrary to this Court's prior order. *See State Engineer v. Eureka County*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017).

This was error for three reasons. First, the decision to have an evidentiary hearing is authority allocated to counsel, not a habeas petitioner. *See* Nev. R. Prof. Conduct 1.2(a). Second, even assuming that a habeas petitioner may decide to forego a hearing, Vanisi was not competent to waive his hearing. Third, allowing Vanisi to waive the hearing and then dismissing the claim without the hearing violated this Court's mandate.

### 1. Having a hearing is the decision of counsel, not petitioner, particularly where petitioner suffers from diminished capacity.

In criminal cases, rules and case law dictate the allocation of authority between counsel and client. Lawyers must abide by a client's decision "concerning the objectives of the representation," "whether to settle a matter," "as to a plea to be entered," "whether to waive jury trial" and "whether a client will testify." Nev. R. Prof. Conduct 1.2(a). Recently, the Supreme Court repeated this distinction, noting that the client decides the above items, while counsel makes "decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'"

*McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)); *see also id.* (noting that "Autonomy to decide that the objective of the defense is to assert innocence belongs" to clients).

Absent from the list of client decisions is the decision to forego an evidentiary hearing on one specific claim during post-conviction proceedings. Such a decision falls within the scope of counsel's authority. Thus, the district court erred in accepting Vanisi's waiver of the evidentiary hearing in this case, because choosing to have the hearing was counsel's decision, and counsel chose to move forward with the hearing. 38AA08157.

Vanisi's expressed litigation objective—focusing solely on guilt-phase relief—is irrelevant because Vanisi did not waive penalty-phase relief, he waived his evidentiary hearing and only his evidentiary hearing. *Id.*[44] If this Court accepts Vanisi as competent and rejects his

[44] That Vanisi only waived his hearing is confirmed by the discussion that occurred after the district court accepted the waiver. The defense, the State, and the district court discussed the legal effect of the waiver, and the district court's next step. 38AA08020–28;

severe mental illness as a categorical bar, then this Court must also narrowly construe the scope of Vanisi's waiver. And, if so, then this Court must also accept that having—or not having—an evidentiary hearing is more akin to trial management and the related questions of what arguments to pursue, what objections to make, and what agreements regarding admission of evidence. *See McCoy*, 138 S. Ct. at 1508.

This is not, as it was in *McCoy*, a question of conceding guilt during the guilt-phase of a trial. *See id.* at 1509. First, conceding guilt during trial relates to a right that exists before conviction. *See id.* Vanisi, though, has already been convicted, thus the pre- and during-trial right *McCoy* refers to is not present here. More importantly, having the evidentiary hearing on the available mitigation evidence

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38AA08069, 38AA08072. Specifically: the State and the defense agreed that in light of Vanisi's waiver—which was only as to the hearing, not as to the claim or other post-conviction relief—the district court needed to separately rule on the merits of Vanisi's remaining claim. 38AA08072–73. Because Vanisi did not present any evidence, the district court denied his claim on its merits. 38AA08073–74. And then the State drafted separate orders, one accepting Vanisi's waiver of the hearing and one denying relief, which the district court adopted. 38AA08076.

would not be a concession of guilt. And, finally, *McCoy* explicitly recognized the possibility that counsel could argue mental state: "[counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could . . . focus his collaboration on urging that McCoy's mental state weighed against conviction." *McCoy*, 138 S. Ct. at 1509.

Vanisi's diminished capacity independently supports finding that the district court should have allowed counsel to decide whether to move forward with the hearing. Nev. R. Prof. Conduct 1.14. Rule 1.14 recognizes that where a lawyer "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ." Professor David M. Siegel, of New England Law School, was asked to opine about counsel's ethical obligations with regard to Vanisi. *See* 36AA07695.[45] He concluded that, in light of Vanisi's

[45] Professor Siegel's opinion was filed in open court. *See* 38AA08057-58.

diminished capacity, undersigned counsel "has an ethical responsibility to pursue an arguably meritorious claim that trial counsel was ineffective, notwithstanding the client's disagreement about this strategy." 36AA07695.

Professor Siegel recognized that post-conviction counsel in death penalty cases has an obligation to "seek to litigate *all issues*, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital representation." 36AA07696 (emphasis in original) (citing American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) [hereinafter 2003 ABA Guidelines], 10.15.1(C).[46] Professor Siegel further noted that the purpose for this directive is "given strict procedural hurdles that are often difficult to overcome, post-conviction counsel should assume any arguably

[46] *See also In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Standards*, ADKT 411 [hereinafter ADKT 411], Standard 2-19(c); *see also* Standard 2-10(a)(3)(B) (counsel shall "evaluate each potential claim in light of" "the near certainty that all available avenues of post-conviction relief will be pursued . . . .").

meritorious claim not raised in the initial application for relief will later be waived or procedurally barred." 36AA07696.

And Professor Siegel concluded that undersigned counsel could reasonably conclude that Vanisi suffered from diminished capacity. 36AA07698. Rule 1.14 of the Model Rules of Professional Conduct—which is the same as Nevada Rule 1.14—offers this commentary on the factors counsel must consider:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Model R. Prof. Conduct 1.14, Comment; *see also* 36AA07696–97. Importantly, these factors—and both Model Rule 1.14 and Nevada Rule 1.14—do not adopt the competency standard. *Compare* Nev. R. Prof. Conduct 1.14 *and* Model R. Prof Conduct 1.14 *with Rees v. Peyton*, 384 U.S. 312 (1966) *and Dusky v. United States*, 362 U.S. 402 (1960). As

Professor Siegel noted, the test for competency "focuses solely on the defendant's competency-related capacities and is a relatively easy bar to meet." 36AA07697.

But, Professor Siegel continued, "the ethical rules recognize degrees of incapacity." *Id.* (citing J. C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 Wash. & Lee L. Rev. 147, 179 (2006) and Virginia Legal Ethics Opinion 1816 (2005)). This distinction is important: a client might be competent but still suffering from diminished capacity. *See* W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana*, 9 St. Mary's J. Legal Mal. & Ethics 92, 102 (2018) (discussing constitutional and professional considerations for client who is both competent and suffering from diminished capacity). Indeed, in its *Faretta* line of cases, the Supreme Court has recognized a sliding scale of competency. *See id.* at 111 (noting that *Indiana v. Edwards*, 554 U.S. 168 (2008), recognized "a new intermediate category of what it called 'gray area' defendants, who pass the low threshold for

competency to stand trial but may not be competent to conduct trial proceedings on their own.").

Professor Siegel concluded that counsel could reasonably conclude that Vanisi suffered from diminished capacity because of the "variability of client's state of mind, impaired ability to appreciate the consequences of his decision, and impaired ability to articulate reasoning leading to his decision." 36AA07698 (internal citations omitted) (citing 36AA07683). And, after concluding that a client suffers from diminished capacity, counsel must determine the best course of action for that client. 36AA07698–99. Here, Professor Siegel concluded the best course of action is continuing to litigate Vanisi's claim. 36AA07699. In fact, Professor Siegel offered, failing to do so "would arguably be in violation of the duty of competence." *Id.*

Thus, because of Vanisi's diminished capacity, the decision to have the hearing properly was counsel's. The district court erred in rejecting this argument, and apparently did so by conflating the competence and diminished capacity standards. *See* 38AA08066 (State: "I think we need to get back to what the test is . . . . whether he's got the capacity to

appreciate his position. That's been established. Whether or not he's making a rational choice. That's been established."); 38AA08068 (The court: "But I agree with what the State has said and I think that Mr. Vanisi has freely and voluntarily waived his right to have a hearing . . . . So, for all the reasons that we've talked about today and the arguments presented by the State, I am going to deny your request to decline to allow Mr. Vanisi to waive his hearing.").

This was error, and this Court should reverse and remand this case as it is counsel, not Vanisi, who must choose to forego a hearing.

**2. Vanisi was not competent to waive the hearing.**

In the alternative, this Court should reverse the district court's finding that Vanisi was competent to waive the evidentiary hearing. The district court's finding was error for two reasons. First, the doctors who evaluated Vanisi did not rely on any valid methodology to evaluate Vanisi. Second, there was not substantial evidence to support a finding of Vanisi's competency.

First, the experts did not employ a valid methodology in evaluating Vanisi. Dr. Zuchowski testified that he went into the

interview without a plan, that his "style is mostly conversation[al]" and that this evaluation was "for lack of a better term chatting about these [referral] questions with Mr. Vanisi." 37AA07839. He did not discuss with Dr. Moulton a plan for how they would conduct their joint interview; they did not discuss who would lead the evaluation; they did not have a forensic reason for conducing the interview together. 37AA07840–41, 37AA07845.[47] Dr. Moulton confirmed that Lake's Crossing does not have standards in place to determine whether a joint interview is appropriate. 37AA07945. Guards were present and Vanisi was in belly and leg chains during the interview. 37AA07843–44; 38AA08055. During the interview, one of the guards asked a question. 38AA08002. None of these decisions is supported by any clinical or forensic guidelines. *See* American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Assessment*, 43 J. of the Am. Acad. Psychiatry & Law, No. 2 (2015 Supp.); *see also* American

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[47] Both Dr. Zuchowski and Dr. Moulton testified the main reason they did a joint interview was convenience. *See* 37AA07841 ("Well that was kind of the direction we received from our boss. We should go down together in a State car and both see Mr. Vanisi at the same time."); *see* 37AA07944 ("because we had to travel to Carson City to see him at the jail, it made sense that we would do a panel . . . .").

Psychological Association, *Specialty Guidelines for Forensic Psychology*, Am. Psychol. (Jan. 2013).

But more importantly, Dr. Zuchowski and Dr. Moulton did nothing to evaluate Vanisi in the specific context here: Vanisi's waiver of a hearing that would have consequences for post-conviction relief in his state post-conviction proceedings. *See* Patricia A. Zapf & Ronald Roesch, *Evaluation of Competence to Stand Trial in Adults in Forensic Assessments in Criminal and Civil Law*, 17, 22 (ed. Ronald Roesch & Patricia A. Zapf 2013) (noting that competency evaluation "cannot simply be assessed in the abstract, independent of contextual factors"). That is, an evaluation must both look to the defendant's ability and what the defendant is tasked with doing. *Id.* Though Dr. Zuchowski and Dr. Moulton both evaluated Vanisi's rationality, neither doctor appreciated the complexity of understanding the choice Vanisi was making, or Vanisi's self-denial about his mental health problems.

For example, Dr. Zuchowski testified that Vanisi was "optimistic" because "he had read decisions that reversed, that found reversible error in the guilt phase of somebody's trial, and that the person was

granted a new trial by the Federal Court." 37AA07872. But Dr. Zuchowski did not ask Vanisi questions related to the federal habeas doctrines of procedural default, the statute of limitations, or the deference federal habeas courts give to state court decisions.[48] 37AA07872–73. Vanisi initially told Dr. Zuchowski that his chances in federal court—on his guilt-phase claims—were "excellent." 37AA07874. He downgraded his assessment to "hopeful," but Dr. Zuchowski did not press him on his logic. *See* 37AA07874.[49] Similarly, Dr. Moulton

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[48] *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (noting federal courts will not review "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"); 28 U.S.C. § 2244(d) (imposing one year statute of limtiations; *see also Mayle v. Felix*, 545 U.S. 644, 657 (2005) (requiring amendments to petition to "relate back" to same conduct, transaction, or occurrence set forth in timely petition); 28 U.S.C. § 2254(d) (prohibiting grant of federal habeas relief unless state court adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law" or "was based on an unreasonable determination of facts.").

[49] A 2007 study of federal habeas relief indicated that, in death penalty cases, federal courts granted guilt-phase relief in only 2.7% of cases. *See* Nancy King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts*, 51 (noting that of 368 cases studied, 33 received relief, and of these 33, 23 were sentencing relief only). As the late Judge Reinhardt reflected, obtaining federal habeas relief has only gotten more difficult as time has passed. *See* Stephen R. Reinhardt, *The Demise of Habeas and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of*

explained that there had to be some allowance for basic human optimism, thus simply suffering mental illness and being optimistic was insufficient to establish incompetence. *See* 38AA07965–66. But, like Dr. Zuchowski, Dr. Moulton did not testify that he questioned Vanisi about the various procedural hurdles that Vanisi needed to get through in order to secure habeas relief.

The problem with Dr. Zuchowski and Dr. Moulton's approach is not just that Vanisi's optimism is exaggerated. Rather the issue is that Dr. Zuchowski and Dr. Moulton's failure to question Vanisi on these issues reflects that the doctors failed to consider context in their evaluation of Vanisi.

Additionally, both doctors failed to weigh Vanisi's self-denial—and the relevance of that self-denial in assessing the strength of Vanisi's mitigating evidence—in determining that Vanisi was competent. Dr. Moulton testified that during the evaluation, Vanisi acknowledged his mental illness, but that this contrasted with the prison records, which

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*Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219 (2015).

showed Vanisi trying to get off forced medication. 38AA07954–55. But Dr. Moulton did not address how Vanisi's self-denial also would affect Vanisi's communications with counsel, and how Vanisi's self-denial would affect counsel's ability to rationally communicate the need of the evidentiary hearing.

Thus, this Court should reverse the district court because Dr. Zuchowski's and Dr. Moulton's evaluations were insufficient.

This Court should also reverse the district court as there was not substantial evidence to support Vanisi's competence. *See Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006) (noting a finding of competence will not be overturned if it is supported by substantial evidence). Dr. Zuchowski explained that Vanisi suffers from schizoaffective disorder, but that the disease was in remission because Vanisi was receiving medication. *See* 37AA07881, 37AA07882. Thus, Dr. Zuchowski concluded that Vanisi was "able to make a rational choice with respect to waiving the hearing" and his mental illness "did not affect his ability to engage in this process and make a rational choice." But Dr. Zuchowski also discussed how the prison records

indicated that Vanisi missed a Haldol shot. *See* 37AA07863.[50] This undercuts Dr. Zuchowski's ultimate conclusion, and thus, the district court erred in relying on it.

Additionally, Dr. Moulton's testimony also failed to establish substantial evidence of Vanisi's competence. Dr. Moulton observed that he did not "believe that Mr. Vanisi is malingering" and did not "question that Vanisi has a serious mental illness." 37AA07934. This supports that Vanisi is not competent. Additionally, Dr. Moulton's testimony about the inconsistency between Vanisi's conduct during the evaluation and with prison officials—in acknowledging and denying, respectively, his mental illness—supports that Vanisi is not competent. These facts undercut Dr. Moulton's conclusions too, and thus the district court erred in finding Vanisi competent.

[50] Vanisi indicated he did receive his Haldol shot, but this should be discounted in light of the fact that it was not testimony. *See* 37AA07865.

### 3. The district court violated the mandate rule in accepting Vanisi's wavier.

This Court ordered an evidentiary hearing. *Vanisi*, 2017 WL 4350947, at *3. That hearing did not occur. This violates the mandate doctrine. "When an appellate court remands a case, the district court 'must proceed in accordance with the mandate and the law of the case as established on appeal." *State Engineer* 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) (quoting *E.E.O.C. v. Kronos, Inc.*, 694 F.3d 351, 361 (3d Cir. 2012)). A "district court commits 'jurisdictional error' if it takes actions that contradict the mandate." *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016). In light of this Court's prior order, the district court lacked the authority to do anything but have the evidentiary hearing. Thus, the court erred in accepting Vanisi's waiver and denying his claim without a hearing.

## C. The district court erred by failing to disqualify the Washoe County District Attorney's office.

In its order, the district court noted that Washoe County District Attorney's office "does not dispute that in preparation for the evidentiary hearing scheduled to commence October 1, 2018, it . . .

obtained information that was previously subject to attorney client privilege and/or confidential in nature." 37AA07786.[51] This reflects the fact that there was considerable confusion over whether the Washoe County District Attorney's office represents trial counsel in post-conviction proceedings and in what manner Vanisi waived his privilege and confidentiality. Because this confusion allowed the district attorney's office to obtain privileged and confidential information, the district court erred by failing to disqualify the district attorney's office.

### 1. There was confusion about whether the Washoe County District Attorney's office represented the Washoe County Public Defender's office in post-conviction proceedings.

Shortly after remittitur issued in Vanisi's direct appeal, the district attorney moved the district court to set a date for Vanisi's execution. *See* 12AA2529; *see also* 12AA2527. The hearing on the State's request was held in January 2002. Because post-conviction counsel was not yet appointed, Vanisi was represented at this hearing by two of his trial attorneys. *See* 12AA2541. In open court at this

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[51] This language, like the rest of this order, was drafted by the State.

hearing, trial counsel filed on Vanisi's behalf a petition for post-conviction relief and a motion for appointment of counsel. *See* 19AA3932; 12AA02530; 12AA2548–49. They noted the petition likely alleged ineffective assistance of counsel, causing a conflict of interest between them and Vanisi. *See* 12AA2550.

In March 2002, the district court appointed Marc Picker and Scott Edwards as Vanisi's post-conviction counsel. *See* 12AA2553. The same order required trial counsel to give post-conviction counsel Vanisi's file. *See id.* Problems with this order arose immediately. Within eight days, post-conviction counsel wrote to trial counsel asking for an indication when the file would be turned over. *See* 36AA7653. Post-conviction counsel received no response. *See* 36AA7714. Roughly two weeks later, post-conviction counsel faxed trial counsel a copy of the order and a request for notification when the file was ready. *See* 36AA7665.

By late April, the Washoe County District Attorney's office became involved in post-conviction counsel's quest to get the file from trial counsel. Post-conviction counsel appeared to believe that they needed the State's blessing for a waiver of attorney-client privilege, to be signed

by Vanisi, and so faxed a draft waiver to the State for approval. *See* 36AA7648 ("Terry—Look this over and let me know today whether this covers everything you need to be said. Marc."). The attached waiver reads:

> I, Siaosi Vanisi, do hereby expressly waive the attorney-client privilege between myself and all members of the Washoe County Public Defenders Office—past or present—as it relates to that office's representation of me on criminal charges in the case underlying my current Petition for Writ of Habeas pending inthe [sic] Second Judicial District Court.
>
> This waiver expressly allows my previous trial and appellate counsel to discuss my case with the district attorney's office.
>
> I also recognize and intend that this waiver allows the public defenders office to release all papers, tapes, work product, memos, investigative reports, notes and documents to my current attorneys.

36AA7649. Handwritten on this document was a notation: "This is fine, Terry." *Id.*[52] Vanisi later signed this waiver. *See* 36AA7659.[53]

By May, post-conviction counsel received much of the file. *See* 36AA7714. By June, though, counsel suspected parts of the file had been withheld because the Nev. S. Ct. R. 250 memorandum was missing. *See* 36AA7652; *see also* 36AA7714. At a July hearing, post-conviction counsel explained that part of the difficulty was murkiness with regard to who at the public defender's office controlled the file. 36AA7715. The district attorney, counsel explained, solved this problem:

> What we did end up with is on Friday Mr. McCarthy, through I'm not even sure how at this point, he ended up with a copy of the memo. Now I'm not sure under the rule that's proper, but somehow we now all got it. Because, but Mr. McCarthy has a copy, and I know that my client's never agreed to that, but he never waived it, but

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[52] "Terry" is Terrence McCarthy from the criminal appeals unit of the Washoe County District Attorney's office.

[53] Though the typed waiver indicates it was signed in March 2002, the signature line is undated. *Id.* Additionally, Picker faxed an unsigned copy to McCarthy for approval on April 23, 2002, implying that the waiver could not have been signed until April 23, 2002, at the earliest. *Id.*

> here we are, and we received a copy through Mr. McCarthy.

36AA7716. McCarthy elaborated:

> I got my Rule 250 memo by calling up and politely asking for it, and Steve Gregory took time out his day and found it and copied it. I don't know why it wasn't done before. I didn't find it very difficult. It took me all of three minutes to arrange.

36AA7719.

During this same hearing, post-conviction counsel referenced that the district attorney represented trial counsel: "Now, if that's the way this case is going to be run, and I don't think, I know Mr. McCarthy has nothing to do with that, *but it is unfortunately his client* so he gets stuck with them." 36AA7717 (emphasis added). The State clarified that they did not represent the attorneys at the public defender's office. 36AA7719. But this clarification—coming long after the State approved a waiver for Vanisi to sign, after the Rule 250 Memo had to be acquired

through the State, and after post-conviction counsel believed that they represented trial counsel—came too late.[54]

### 2. Disqualification is required because a specifically identifiable impropriety occurred.

To prevail on a motion to disqualify, the movant must show: (1) there is "at least a reasonable probability that some specifically identifiable impropriety did in fact occur" and (2) "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989) (quoting *Shelton v. Hess*, 599 F. Supp. 905 (S. D. Tex. 1984)). "One purpose of disqualification is to prevent disclosure of confidential information that could be used to a former client's disadvantage." *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 53, 152 P.3d 737, 743 (2007).

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[54] Confusion over the relationship between the public defender and the Washoe County District Attorney's office did not end in 2002. In June of 2018, the district attorney's office reached out to Vanisi's trial investigator. 35AA7451–52. The investigator was unsure whether this was appropriate, and so reached out to the public defender office, and was given the impression that the district attorney's office was representing the public defender's office at the evidentiary hearing. *Id.*

No public interests justify allowing the Washoe County District Attorney's office to continue representation. In *Cronin*, this Court held that *ex parte* communications with a represented parted was "reprehensible" and concluded that such communications required disqualification. *Cronin*, 105 Nev. at 641, 781 P.2d at 1154. The present situation is analogous: two improprieties cut to fundamental aspects of the attorney-client relationship.

First, by advising—or failing to correct the misimpression—that the district attorney's office represented the public defender's office, the district attorney's office improperly insinuated itself into the interaction between Vanisi, post-conviction counsel, and trial counsel. This resulted in post-conviction counsel encountering great difficulty in acquiring the trial file.[55]

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[55] If the either the public defender's office or the district attorney's office believed that they had an attorney-client relationship, there would also be a conflict of interest between the public defender's office—with an ongoing duty to former clients—and the district attorney's office—with an incentive that is contrary to the public defender's clients. *See* Nev. R. Prof'l Conduct 1.9 (duties to former clients); 1.7 ("A concurrent conflict of interest exists if . . . There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

Second, the district attorney's office improperly accessed privileged and confidential materials related to trial counsel's representation of Vanisi. *See* 37AA7786. Because Vanisi has not validly waived his confidentiality or privilege, this was improper.

### 3. There is no proper waiver of Vanisi's confidentiality or privilege.

In filing his 2002 petition, Vanisi did not waive any confidentiality or privilege.

NRS 34.735, the petition form, instructs post-conviction petitioners: "If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective." *See* NRS 34.735 (Instruction #(6)). This admonition is not otherwise present in the statutes governing post-conviction petitions. This statute does not establish the "informed consent" required to relieve counsel of their duties of confidentiality, as the form by itself does not establish that a client is aware of the waiver. *See* Nev. R. Prof'l Conduct 1.6(A) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); *see also* Nev. R.

Prof'l Conduct 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of an reasonably available alternatives to the proposed course of conduct.").

Nor does the petition Vanisi actually filed in January, 2002, handwritten and pro per, include this waiver. 19AA3932. Indeed, twice in this petition, Vanisi wrote, "I am indigent and do not understand the law and need counsel appointed to help me complete this petition and file a supplemental petition." 19AA3938. Thus, the actual filing of Vanisi's petition, also, cannot serve as a waiver with the "informed consent" required under Nev. R. Prof'l Conduct 1.6.

The waiver that Vanisi did sign, also, is insufficient. Post-conviction counsel evidenced confusion over the role of the district attorney's office and its relationship with trial counsel. *See* 36AA07648–49, 36AA07659, and 36AA07717. Given post-conviction counsel's confusion, Vanisi could not have received "adequate information and

explanation about the material risks of an reasonably available alternatives" to signing the waiver. *See* Nev. R. Prof'l Conduct 1.0(e).

Finally, the self-defense exception under Nev. R. Prof'l Conduct 1.6(b)(5) does not apply here. This is not a controversy between trial counsel and Vanisi. *See id.* There is no criminal charge or civil claim against trial counsel. *Id.* And, at the time of the confusion over who represented trial counsel, there were none but general "allegations" concerning the "lawyer's representation of the client." *See id.* Vanisi's pro per petition alleged two claims, which read in full:

> (A) Ground One: Denied rights under Fourth, Fifth, Sixth and Fourteenth Amendments as I did not receive due process of law or *effective assistance of counsel* at trial.
>
> Supporting facts (tell your side of the story briefly without citing cases or law) I am indigent and do not understand the law and need counsel appointed to help me complete this petition and file a supplemental petition.
>
> (B) Ground Two: Denied rights under Fourth, Fifth, Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel on appeal.
>
> Supporting facts (Tell your story briefly without citing cases or law.) I am indigent and do not

> understand the law and need counsel appointed to help me complete this petition and file a supplemental petition.

19AA03938. As the State would later describe, this petition did not raise any claims. *See* 14AA02807 ("At this point there are no claims pending before the Court."). Thus, at the time that trial counsel turned over the Rule 250 memorandum, there were no allegations to respond to, and thus revealing the information in that memorandum was not "reasonably" "necessary." Nev. R. Prof'l Conduct 1.6(b).

For the foregoing reasons, this Court must reverse the district court's decision refusing to disqualify the Washoe County District Attorney's office. Vanisi should also be restored to the position he was in before the Washoe County District Attorney's office obtained confidential and privileged information regarding his case.

### D. Vanisi is entitled to post-conviction relief because he was deprived of his right to represent himself and, during the guilt-phase of his right to counsel.

The trial court denied Vanisi's request to represent himself pursuant to *Faretta v. California*, 422 U.S. 806, 833-34 (1975). Vanisi then had to proceed with conflicted counsel. Both errors constitute

structural error that amounted to the "total deprivation of the right to counsel" in violation of Vanisi's state and federal rights to due process, confrontation, effective counsel, a reliable sentence, a fair trial, equal protection, and freedom from cruel and unusual punishment.

### 1. This Court's denial of Vanisi's *Faretta* claim was erroneous.

Defendants in criminal cases have the right to represent themselves. *See Faretta*, 422 U.S. 806; *see also Debates and Proceedings*, at 782 (debating whether Nev. Const. art. 1, § 8 should read "shall be allowed to appear and defend in person, *and* with counsel" or read "*or* with counsel," to ensure that the right to self-representation was preserved).

Between Vanisi's first and second trials, an irreconcilable conflict developed between Vanisi and his counsel. As a result, Vanisi filed a motion to dismiss the Washoe County Public Defender's Office. 17AA03479. On June 23, 1999, a closed hearing was held before the district court. 17AA03508. Vanisi informed the court that his attorneys: (1) did not adequately explain things to him; (2) did not accept his collect calls; (3) would not file a motion to dismiss based on double

jeopardy; and (4) falsely represented to the court the number of times they had visited Vanisi. 17AA03513–30. The court opined that Vanisi was merely attempting to delay the trial and denied Vanisi's motion. 17AA03542–43.

Unable to persuade the court to provide him with new counsel, on August 3, 1999, Vanisi orally requested to represent himself at his September 7, 1999, trial. The trial court instructed Vanisi to submit his motion in writing. 17AA03555. On August 5, 1999, Vanisi filed a written motion for self-representation. 17AA03490. On August 10, 1999, a hearing was held on that motion. 17AA03595. The court canvassed Vanisi pursuant to SCR 253 and heard testimony from a psychiatrist who had treated Vanisi and deemed him competent. *Id.* The State supported Vanisi's motion. *See* 18AA03679.

The next day, August 11, 1999, the court entered an order denying Vanisi's motion. 17AA03497. This Court upheld the trial court's denial of the motion for self-representation on the basis that Vanisi intended to delay the proceedings, and because Vanisi would disrupt the proceedings. *Vanisi*, 117 Nev. at 338–41, 22 P.3d at 1170–71. Both of

these rulings were contrary to the controlling federal law and belied by the record.[56]

In determining whether a *Faretta* motion was made in order to secure delay, courts must consider the events preceding the motion to determine whether they are consistent with a good faith assertion of the *Faretta*, right. *See Avila v. Roe*, 298 F.3d 750, 754 (9th Cir. 2002). Here, the record is devoid of evidence that Vanisi asserted his *Faretta* right as a dilatory tactic. In fact, Vanisi unequivocally indicated he was ready to proceed to trial: "I just wanted to put on the record that I am not, I'm not—I'm not delaying time. I will be ready on September 7." 17AA03638. If the trial court were concerned that Vanisi would later seek a continuance, the appropriate action would have been to deny the continuance. It was not a basis to deny Vanisi's motion.

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[56] Notably, the concurrence in Vanisi's direct appeal incorrectly stated the majority's holding: "I concur in the majority's conclusion that Vanisi's request to represent himself was improperly denied on the bases of the delay in asserting his request and the complexity of his case." *Vanisi*, 117 Nev. at 345, 22 P.3d at 1174 (Rose, J., with Agosti and Becker, JJ., concurring) (emphasis added); *see id.* at 340, 22 P.3d at 1171 ("We conclude that the district court acted within its discretion in finding that Mr. Vanisi harbored an intent to delay the proceedings.")

Additionally, the record did not support the trial court's finding that Vanisi would be disruptive during the proceedings. As a basis for denying a *Faretta* motion, disruption must be flagrant and happen during trial. *See United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989) ("The flagrant disregard *in the courtroom* of elementary standards of proper conduct should not and cannot be tolerated." (emphasis in original)). The type of flagrant conduct anticipated in *Flewitt* was described by the Supreme Court in *Illinois v. Allen*, 397 U.S. 337, 338 (1970), as where, for example, a defendant engages "in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." Nothing in the record suggests Vanisi's behavior before trial ever approximated this level of disruption. On the contrary, the State conceded Vanisi was not disruptive. *See* 18AA03677 ("But certainly this morning Vanisi has been anything but disruptive."); *see also Vanisi*, 117 Nev. 345-46, 22 P.3d at 1174-75 (Rose, J., with Agosti and Becker, JJ., concurring,).

The district court erred in denying Vanisi's *Faretta* motion. The prejudice to Vanisi is automatic because *Faretta* is not subject to the harmless error rule. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). Vanisi is entitled to a new trial.

### 2. Vanisi was constructively deprived of counsel at the guilt phase.

After denying Vanisi's request for new counsel and denying his *Faretta* motion, the court erred again by refusing to allow trial counsel to withdraw, in violation of Vanisi's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution. Forcing Vanisi to proceed to trial with conflicted counsel rendered his right to counsel meaningless, and constituted structural error. *See United States v. Cronic,* 466 U.S. 648 (1984); *see also United States v. Collins*, 430 F.3d 1260, 1266 (10th Cir. 2005) (defendant was constructively denied counsel at a critical stage in the proceedings when counsel sought to withdraw from representation but the court went ahead with Collins' competency hearing before addressing the motion to withdraw).

On August 26, 1999, an *in camera* hearing was held to hear from Vanisi's counsel on an *ex parte* motion to withdraw filed pursuant to SCR 166 and 172. 18AA03683. During that hearing, trial counsel revealed to the court that in February 1999, he had a conversation with Vanisi during which Vanisi admitted killing the alleged victim. 18AA03685. Counsel explained, as a result of this admission, trial counsel attempted to fashion a defense based upon provocation, but Vanisi refused to discuss this defense. Instead, Vanisi wanted to present a defense that someone else had committed the killing. 18AA03685, 18AA03692.

Trial counsel then sought ethics advice from bar counsel, Michael Warhola. "Without hesitation," bar counsel advised trial counsel to withdraw from Vanisi's representation. 18AA03688, 18AA03695. Additionally, bar counsel informed trial counsel that, in light of the conflict, it would be a prohibited ethical violation for them to offer evidence, cross-examine vigorously, or even select a jury. 18AA03695, 18AA03700.

During the hearing on their motion, trial counsel cautioned the court that if they were not allowed to withdraw, they would have to certify themselves ineffective. 18AA03688, 18AA03691. Counsel explained, if they were required to stay on the case, Vanisi would not have a defense because counsel would have to sit "like bumps on a log doing nothing." 18AA03692. The court denied their motion to withdraw. 24AA05052.

Evidence of trial counsel's inability to mount a defense manifested before Vanisi's jury was even seated. Trial counsel failed to life qualify the jury or move to excuse biased jurors for cause, and exercised peremptory challenges ineffectively. *See* 15AA03133–38 (laying out facts). Trial counsel failed to object to unconstitutional jury instructions and request constitutional instructions; failed to object to Vanisi wearing a stun belt; and failed to renew their request for a change of venue after voir dire was complete, 6AA01125. 15AA03139–40 (raising claims).

Critically, trial counsel failed to move to bar Vanisi's retrial on the grounds of double jeopardy, despite Vanisi's specific demand that they do so. *See* 17AA03524–28.[57]

At the retrial, Vanisi's counsel continued to sit on their hands. They made no opening statement, 6AA01146; 8AA01634; cross-examined only five of the State's witnesses, *see* 6AA01182; 6AA01223; 7AA01392; 8AA01592; failed to object to numerous instances of prosecutorial misconduct, 15AA03139 (raising claims); failed to call any witnesses in Vanisi's defense, 8AA01636; and failed to make a closing argument, 8AA01673.

Where, as here, a defendant is completely denied his right to representation, prejudice is presumed. *See Harding v. Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989) (defense counsel's failure to object when judge directed verdict of guilt was ineffective per se without showing prejudice); *see also Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984)

[57] Trying Vanisi after the district court ordered a mistrial denied Vanisi of his right to be free from double jeopardy. *See* U.S. Const. amend. V (nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); *see also* Nev. Const. Art. 1, § 8, ¶1.

(defense counsel who refused to actively participate in the trial was ineffective under *Strickland*). Vanisi is entitled to a new trial.

## VI. CONCLUSION

In the months leading to Vanisi's conviction and death sentence, two moments stick out as particularly insightful.

In the first, trial counsel implored the court that competency evaluations were not enough because, counsel explained, "This man needs some medical help so that I can deal with him as a defense attorney . . . . And so that we can carry on proceedings in a fairly civilized manner." 24AA05000. It was the promise of more civilized proceedings—free from arbitrary and capricious factors—that allowed the United States Supreme Court to end its moratorium on the death penalty. But, as counsel indicated: Vanisi's mental illness prevented him from cooperating with counsel. And without that cooperation, Vanisi's sentence could not be reliable.

The second insightful moment came after trial counsel concluded working with Vanisi was impossible, and moved to withdraw. The court asked, "Who could represent Vanisi? If your position is correct, who

could represent him?" 18AA03694. Severe mental illness prevents a reliable adjudication; because Vanisi suffers from severe mental illness, who, indeed, could represent him? That no attorneys have successfully placed Vanisi's mitigation evidence in front of a fact-finder shows that the answer to the court's question is "no one."

This, the Nevada Constitution cannot countenance. That which weighs most heavily against a death sentence—Vanisi's severe mental illness—cannot instead be what guarantees it.

In recognition of the fatal unreliability introduced into capital proceedings by severe mental illness, this Court should recognize that Article 1, Section 6 of the Nevada Constitution exempts Vanisi from the death penalty.

In the alternative, this Court should reverse the district court's holding accepting Vanisi's waiver, reverse the district court's order declining to disqualify the Washoe County Public Defender, or grant Vanisi post-conviction relief.

For the foregoing reasons, Vanisi requests that this Court reverse the district court's holdings and remand this case for proceedings consistent with such relief.

DATED this 26th day of September, 2019.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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Respectfully submitted,

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## CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September, 26th, 2019. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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